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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 33

MICHAEL WILSON, GALE SONDERGARD, HOWARD DA SILVA, ET AL., PETITIONERS,

vs.

LOEW'S INCORPORATED, PARAMOUNT PICTURES, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITION FOR CERTIORARI FILED NOVEMBER 5, 1956.
CERTIORARI GRANTED JANUARY 21, 1957.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 610835

MICHAEL WILSON, GALE SONDERGARD, HOWARD DA SILVA, JOHN HOWLAND CHAMBERLIN, FRED GRAF, ALVIN HAMMER, DONALD A. GORDON, ROBERT LEES, ROBERT L. RICHARDS, WALDO SALT, PHILIP STEVENSON, LOUISE ROUSSEAU, ALFRED LEWIS LEVITT, PAUL JARRICO, ABRAHAM LINCOLN POLONSKY, WILMA SHORE, HERTA UERKVITZ, PAUL PERLIN, GUY ENDORE, EDWARD F. HUEBSCH, FREDERIC I. RINALDO, LOUIS SOLOMON and ANNE REVERE, Plaintiffs,

v.

LOEW'S INCORPORATED, a corporation; PARAMOUNT PICTURES, INC., a corporation; COLUMBIA PICTURES CORPORATION, a corporation; R.K.O. RADIO PICTURES, INC., a corporation; WARNER BROTHERS PICTURES, INC., a corporation; REPUBLIC PRODUCTIONS, INC., a corporation; SAMUEL GOLDWYN STUDIOS, INC., a corporation; HAL E. ROACH STUDIO, INC., a corporation; TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation; UNIVERSAL PICTURES COMPANY, INC., a corporation; WARNER BROS. PICTURES DISTRIBUTION CORP., a corporation; WALD-KRASNA PRODUCTIONS, INC., a corporation; UNITED STATES PICTURES, INC., a corporation; STANLEY KRAMER COMPANY, a corporation; STANLEY KRAMER PRODUCTIONS, INC., a corporation; SOL LESSER PRODUCTIONS, INC., a corporation; CITADEL PICTURES, a corporation; MOTION PICTURE ASSOCIATION OF AMERICA, INC., a corporation; SOCIETY OF INDEPENDENT [fol. 2] MOTION PICTURE PRODUCERS, a corporation; 1 DOE CO., a corporation; 2 DOE CO., a corporation; 3 DOE CO., a corporation; 4 DOE CO., a corporation; 5 DOE CO., a corporation; 6 DOE CO., a corporation; 7 DOE CO., a corporation; 8 DOE CO., a corporation; 9 DOE CO., a corporation; 10 DOE CO., a corporation; 11 DOE CO., a corporation; 12 DOE CO., a corporation; 13 DOE CO., a corporation; 14 DOE CO., a corporation; 15 DOE CO., a corporation; 16

DOE Co., a co-partnership, 17 DOE and 18 DOE, co-partners; 19 DOE Co., a co-partnership; 20 DOE and 21 DOE, co-partners; 22 DOE Co., a co-partnership; 23 DOE and 24 DOE co-partners; 25 DOE Co., a co-partnership; 26 DOE and 27 DOE, co-partners; 28 DOE Co., a co-partnership; 29 DOE and 30 DOE, co-partners, L. B. MAYER, HOWARD HUGHES, E. B. MANNIX, Y. FRANK FREEMAN, HENRY GINSBERG, HARRY COHN, BEN B. KAHANE, DORE SCHARY, HARRY M. WARNER, JACK WARNER, HERBERT J. YATES, SAMUEL GOLDWYN, HAL E. ROACH, WALTER WANGER, JOSEPH M. SCHENCK, STANLEY E. KRAMER, SOL LESSER, LEO SPITZ, DARRYL ZANNUCK, JAMES GRANGER, 31 DOE, 32 DOE, 33 DOE, 34 DOE, 35 DOE, 36 DOE, 37 DOE, 38 DOE, 39 DOE, 40 DOE, JOHN S. WOOD, FRANCIS E. WALTER, MORGAN M. MOULDER, CLYDE DOYLE, JAMES B. FRAZIER, HAROLD E. VELDE, BARNARD W. KEARNEY, DONALD L. JACKSON, CHARLES E. POTTER, LOUIS J. RUSSELL, WILLIAM WHEELER, 41 DOE, 42 DOE, 43 DOE, 44 DOE, 45 DOE, 46 DOE, 47 DOE, 48 DOE, 49 DOE, and 50 DOE, Defendants.

COMPLAINT—Filed March 10, 1953

Plaintiff Michael Wilson in this first cause of action complains of defendants above named and alleges:

I

Plaintiff is by profession a motion picture writer and has had more than five years experience in working as a writer and has acquired a reputation for excellence of work in the motion picture industry and has won high esteem as a writer in said industry, all of which defendants at all times herein mentioned well knew.

II

Defendant Loew's Incorporated is a corporation organized under the laws of the state of Delaware. Defendant Loew's [fol. 3] Incorporated is engaged in the production and distribution of motion pictures. It has principal offices in Culver City, in the County of Los Angeles, State of Cali-

fornia, and in New York City in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California, in New York, in other States in the United States, and in London, England.

Defendant Paramount Pictures, Inc., is a corporation organized under the laws of New York. Defendant Paramount Pictures, Inc. is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, State of California, and in New York City in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California, in New York, and in other States in the United States.

Defendant Columbia Pictures Corporation is a corporation organized under the laws of New York. Defendant Columbia Pictures Corporation is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, County of Los Angeles, State of California, and in New York City in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California, in New York, and in other States in the United States.

Defendant R.K.O. Radio Pictures, Inc. is a corporation organized under the laws of Delaware. Defendant R.K.O. Radio Pictures, Inc. is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, County of Los Angeles, State of California. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California, in New York, and in other States of the United States.

Defendant Warner Brothers Pictures, Inc. is a corporation organized under the laws of Delaware. Defendant War- [fol. 4] ner Brothers Pictures, Inc. is engaged in the production and distribution of motion pictures. It has princi-

pal offices in the City of Burbank, County of Los Angeles, State of California, and in New York City in the State of New York. It owns and operates facilities for the production of motion pictures and for the distribution of motion pictures in California, in New York, and in other States in the United States.

Defendant Republic Productions, Inc. is a corporation organized under the laws of New York and Delaware. Defendant Republic Productions, Inc. is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, County of Los Angeles, State of California, and in New York City in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California. . .

Defendant Samuel Goldwyn Studios, Inc. is a corporation organized under the laws of Delaware. Defendant Samuel Goldwyn Studios, Inc. is engaged in the production and distribution of motion pictures. Its principal office is in the City of Los Angeles, County of Los Angeles, State of California. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in Los Angeles.

Defendant Hal E. Roach Studio, Inc. is a corporation organized under the laws of California. Defendant Hal E. Roach Studio, Inc. is engaged in the production and distribution of motion pictures. Its principal office is in the City of Culver City, County of Los Angeles, State of California. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in Los Angeles.

Defendant Twentieth Century-Fox Film Corporation is a corporation organized under the laws of New York. Defendant Twentieth Century-Fox Film Corporation is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, State of [fol. 5] California, and in New York City in the State of New York. It owns and operates facilities for the produc-

tion of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California, in New York, and in other States in the United States.

Defendant Universal Pictures Company, Inc. is a corporation organized under the laws of the State of Delaware. Defendant Universal Pictures Company, Inc. is engaged in the production and distribution of motion pictures. It has principal offices in Universal City, County of Los Angeles, State of California, and in New York City, in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in Los Angeles County, California, and in New York and in other States.

Plaintiff is informed and believes and upon such information and belief alleges that defendant, Warner Bros. Pictures Distribution Corp. is a wholly owned subsidiary of defendant Warner Brothers Pictures, Inc. and is the agent of defendant Warner for the distribution of motion pictures produced by Warner Brothers Pictures, Inc. Warner Bros. Pictures Distribution Corp. has its principal offices in the State of California and in other states of the United States.

Plaintiff is informed and believes and upon such information and belief alleges that defendant Goldwyn distributes motion pictures produced by it through defendant R.K.O. Radio Pictures, Inc.; further on information and belief plaintiff alleges that defendant Hal E. Roach Studio, Inc. distributes motion pictures produced by it through Loew's Incorporated.

Defendant Wald-Krasna Productions, Inc. is a California corporation engaged in the production and distribution of motion pictures.

Defendant United States Pictures, Inc. is a California corporation engaged in the production and distribution of motion pictures.

Defendant Stanley Kramer Company is a California corporation engaged in the production and distribution of motion pictures.

Defendant Sol Lesser Productions, Inc. is a California [fol. 6] corporation engaged in the production and distribution of motion pictures.

Defendant Citadel Pictures is a California corporation engaged in the production and distribution of motion pictures.

Defendant Motion Picture Association of America, Inc., is a corporation organized by the defendant production companies named in this paragraph II. Its principal office is located in the City of Los Angeles, State of California.

Defendant Society of Independent Motion Picture Producers is a corporation with its principal office and place of business in the County of Los Angeles, State of California.

Plaintiff is informed and believes, and upon such information and belief alleges: That the defendants 1 Doe Co., a corporation; 2 Doe Co., a corporation; 3 Doe Co., a corporation; 4 Doe Co., a corporation; 5 Doe Co., a corporation; 6 Doe Co., a corporation; 7 Doe Co., a corporation; 8 Doe Co., a corporation; 9 Doe Co., a corporation; 10 Doe Co., a corporation; 11 Doe Co., a corporation; 12 Doe Co., a corporation; 13 Doe Co., a corporation; 14 Doe Co., a corporation; and 15 Doe Co., a corporation, are and each of them is a corporation duly organized and existing. 16 Doe Co. is a co-partnership composed of the defendants 17 Doe and 18 Doe, co-partners; the defendant 19 Doe Co. is a co-partnership composed of the defendants 20 Doe and 21 Doe, co-partners; the defendant 22 Doe Co. is a co-partnership composed of the defendants 23 Doe and 24 Doe, co-partners; the defendant 25 Doe Co. is a co-partnership composed of the defendants 26 Doe and 27 Doe, co-partners; the defendant 28 Doe Co. is a co-partnership composed of the defendants 29 Doe and 30 Doe, co-partners.

Plaintiff does not know the true names of the defendants sued herein under the fictitious names of 1 Doe Co., a corporation; 2 Doe Co., a corporation; 3 Doe Co., a corporation; 4 Doe Co., a corporation; 5 Doe Co., a corporation; 6 Doe Co., a corporation; 7 Doe Co., a corporation; 8 Doe Co., a corporation; 9 Doe Co., a corporation; 10 Doe Co., a corporation; 11 Doe Co., a corporation; 12 Doe Co., a corporation; 13 Doe Co., a corporation; 14 Doe Co., a

corporation; 15 Doe Co., a corporation; 16 Doe Co., a co-
[fol. 7] partnership composed of 17 Doe and 18 Doe, co-partners; 19 Doe Co., a co-partnership composed of 20 Doe and 21 Doe, co-partners; 22 Doe Co., a co-partnership composed of 23 Doe and 24 Doe, co-partners; 25 Doe Co., a co-partnership composed of 26 Doe and 27 Doe, co-partners; 28 Doe Co., a co-partnership composed of 29 Doe and 30 Doe, co-partners; 31 Doe, 32 Doe, 33 Doe, 34 Doe, 35 Doe, 36 Doe, 37 Doe, 38 Doe, 39 Doe, 40 Doe, 41 Doe, 42 Doe, 43 Doe, 44 Doe, 45 Doe, 46 Doe, 47 Doe, 48 Doe, 49 Doe, 50 Doe; on discovery of the true names of said defendants so sued under said fictitious names, plaintiff will seek leave to amend this complaint by inserting the true names of such defendants in the place and stead of such fictitious names.

Each of the defendants L. B. Mayer, Howard Hughes, E. J. Mannix, Y. Frank Freeman, Henry Ginsberg, Harry Cohn, Ben B. Kahane, Dore Schary, Harry M. Warner, Jack Warner, Herbert J. Yates, Samuel Goldwyn, Hal E. Roach, Walter Wanger, Joseph M. Schenck, Stanley E. Kramer, Sol Lesser, Leo Spitz, Daryl Zanuck and James Grainger is now, and at all times herein mentioned was a resident of the County of Los Angeles, State of California.

Between them, the said defendants control, directly and indirectly all motion picture production and distribution in the United States of America and likewise control, directly and indirectly, all motion picture employment opportunities in the United States of America for actors, writers, directors, producers and other employees in the motion picture industry.

III

At all times herein mentioned defendant John S. Wood was the chairman of the Committee on Un-American Activities, United States House of Representatives; defendants Francis E. Walter, Morgan M. Moulder, Clyde Doyle, James B. Frazier, Harold E. Velde, Barnard W. Kearney, Donald L. Jackson and Charles E. Potter were members of the said Committee; Louis J. Russell was Senior Investigator of said Committee; William Wheeler was an investigator of said Committee and 41 Doe, 42 Doe, 43 Doe,

44 Doe, 45 Doe, 46 Doe, 47 Doe, 48 Doe, 49 Doe and 50 Doe were representatives of said Committee.

At all times mentioned herein and with respect to the [fol. 8] matters hereinafter alleged the defendants named in the preceding paragraph acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities.

IV

All of the plaintiffs herein have the right to relief herein in respect to and as a result of the same series of acts of defendants hereinafter complained of, and if the plaintiffs brought separate actions, questions both of law and of fact common to all of the parties to this action would arise.

V

On and prior to March, 1951, and continuously thereafter defendants herein and each of them conspired together and agreed with each other to blacklist and to refuse employment to and exclude from employment in the motion picture industry all employees and persons seeking employment in the motion picture industry who had been or thereafter were subpoenaed as witnesses before the Committee on Un-American Activities of the House of Representatives and who, relying on their rights and privileges under the Constitution of the United States including the privilege against self-incrimination under the Fifth Amendment to said Constitution, refused to answer questions concerning their political affiliations, associations and beliefs, and all employees in the motion picture industry and persons seeking employment therein who were named before said Committee as Communists or who were subpoenaed to appear as witnesses before said Committee or who were suspected of ever having been Communists or of ever having any associations with Communists and who refused or failed to appear before said Committee or its agents and waive and surrender their constitutional rights and privileges and testify or give statements fully disclosing their own political affiliations, associations and beliefs and those of their family, friends, associates and acquaintenances; and defendants

agreed that such employees and other persons would not be employed in the motion picture industry; thereupon defendants and each of them with the intent to prevent such employees and other persons from having or obtaining em-
[fol. 9] ployment in the motion picture industry maliciously and without justification undertook to and did induce and persuade each other and other employers in the motion picture industry to blacklist all such employees and other persons and to desist and refrain from employing and to refuse employment to all such employees and other persons. As a part of said conspiracy and as one of the means of effectuating it all of the defendants have published and circulated and are now publishing and circulating throughout the entire motion picture production, distribution and exhibition fields a blacklist containing the names of such employees and other persons with the direction and intent that they be not employed. That the defendants and each of them by this conduct wrongfully, maliciously and without justification or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the motion picture industry and to pursue their professions and occupations therein, and have prevented their employment therein.

VI

On the 20th day of September, 1951, plaintiff Michael Wilson appeared as a witness before the said Committee on Un-American Activities pursuant to subpoena theretofore served upon him. At said time plaintiff refused to answer certain questions concerning his political affiliations, beliefs and associations, basing his refusal upon his constitutional rights, including the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. As a result thereof and by reason of the acts of and pursuant to the conspiracy of the defendants, as hereinabove alleged, plaintiff Michael Wilson ever since September 20, 1951, has been and he now is blacklisted and is refused and is excluded from employment in the motion picture industry by these defendants and all other employers in said industry. Therefore, said plaintiff will henceforth continue to find it impossible to obtain em-

ployment in the profession to which he has devoted a major part of his entire life and energy, unless the injunctive relief hereinafter prayed for is granted.

VII

The refusal of plaintiffs to answer questions before said [fol. 10] Un-American Activities Committee and their refusal to appear before said Committee or its agents and waive and surrender their constitutional rights and privileges and testify or give statements fully disclosing their own political affiliations, associations and beliefs and those of their family, friends, associates and acquaintances have been and are predicated upon the position that the said Committee does not have the authority to require an individual to surrender his constitutional privileges and rights. Each of the plaintiffs intended to, were and are maintaining a political principle of freedom of political association, affiliation and belief, which at all times herein mentioned they have believed and do now believe is one protected by the Constitution of the United States. In this connection plaintiffs allege that it was and is their belief, and it is a fact that it is the purpose of the conspiracy hereinabove described to limit, control and direct the political activities of their employees and to coerce and influence said employees through and by means of threat of discharge and loss of employment to refrain from adopting or following any course or line of political action and activity not acceptable to the said Committee, to limit employment in the motion pic ire industry to those persons whose political beliefs are acceptable to the said Committee and to limit the production of motion pictures by said industry to those the content of which is acceptable to the said Committee.

VIII

By reason of the conspiracy and agreement of defendants, as aforesaid, plaintiff Michael Wilson has suffered and will continue to suffer damages as follows:

(a) For loss of opportunity of employment in the motion picture industry and deprivation of artistic and intel-

lectual gratification flowing therefrom and the resulting serious humiliation and anguish in the sum of $1,000,000.00.

(b) Said plaintiff has been required to and will in the future be required to make known the reasons for his blacklisting and inability to obtain employment in the motion [fol. 11] picture industry thus jeopardizing his opportunities to obtain and retain employment in other industries in the future to his damage in the sum of $250,000.00.

(c) Defendants in doing the acts hereinabove alleged have acted maliciously, oppressively, wilfully, fraudulently and wantonly, and by reason thereof defendants should be required to pay plaintiff Michael Wilson punitive damages in the sum of $1,000,000.00.

IX

The full measure of damages suffered by plaintiffs by reason of the conduct of defendants hereinabove set forth are not readily ascertainable and such damages cannot be measured in terms of money damages alone; defendants by their conduct, as aforesaid, threaten great and irreparable damage to all of the plaintiffs and to all employees of the motion picture industry and persons seeking employment therein similarly situated; such conduct of defendants will lead to a multiplicity of suits unless restrained and enjoined by this Court; defendants threaten to and will, unless restrained by this Court, continue to commit the acts hereinabove alleged, and plaintiffs and each of them are without any plain, speedy or adequate remedy at law.

(Clerk's Note. Entered Pursuant to Stipulation of Counsel)

"The second to eighteenth causes of action, inclusive, and the twenty-third cause of action in said complaint are identical with the first cause of action except for the name of the plaintiff in each cause of action, his or her number of years of experience and his or her profession, and the date of the appearance of each plaintiff before the House Committee on Un-Ameri-

can Activities. The facts as alleged on each of these matters are set forth in the table below:

Cause of Action No.	Name of Plaintiff	Occupation of Plaintiff in Motion Pictures and Length of Experience	Date of Committee Appearance
2nd	Gale Sondergard	Actress, 25 yrs.	March 1951
3rd	Howard Da Silva	Actor, 10 yrs.	Mar. 22, 1951
4th	John Howland Chamberlin	Actor, 5 yrs.	Sept. 19, 1951
5th	Fred Graf	Actor, 7 yrs.	Apr. 11, 1951
6th	Alvin Hammer	Actor, 10 yrs.	May 16, 1951
7th	Donald A. Gordon	Story Editor 20 yrs.	Sept. 25, 1951
8th	Robert Lees	Writer, 15 yrs.	Apr. 11, 1951
9th	Robert L. Richards	Writer, 10 yrs.	Sept. 20, 1951
10th	Waldo Salt	Writer, 15 yrs.	Apr. 13, 1951
11th	Philip Stevenson	Writer, 5 yrs.	Sept. 19, 1951
12th	Louise Rousseau	Writer, 5 yrs.	Sept. 21, 1951
13th	Alfred Lewis Levitt	Writer, 10 yrs.	Sept. 1951
14th	Paul Jarrico	Writer, 10 yrs.	Apr. 13, 1951
15th	Abraham Lincoln Polonsky	Writer, 5 yrs.	April 1951
16th	Wilma Shore	Writer, 5 yrs.	Sept. 18, 1951
17th	Herta Uerkvitz	Head Research Worker, 15 yrs.	Sept. 21, 1951
18th	Paul Perlin	Grip, 15 yrs.	Oct. 5, 1952
23rd	Anne Revere	Actress, 10 yrs.	Apr. 17, 1951."

[fol. 35]

Plaintiff Guy Endore in This Nineteenth Cause of Action Complains of Defendants Above Named and Alleges:

I

Plaintiff repeats and incorporates herein, as if herein fully rewritten, paragraphs II, III, IV, V, VII and IX of the first cause of action hereof.

II

Plaintiff is by profession a motion picture writer and has had more than five years experience in working as a writer and has acquired a reputation for excellence of work in the motion picture industry and has won high esteem as a writer in said industry, all of which defendants at all times herein mentioned well knew.

[fol. 36]

III

During the month of November, 1951, plaintiff Guy Endore was named as a Communist by a witness appearing before the said Committee on Un-American Activities. At all times plaintiff has failed and refused to appear before the said committee to answer questions concerning his political affiliations, beliefs and associations, basing his refusal upon his constitutional rights, including the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. As a result thereof and by reason of the acts of and pursuant to the conspiracy of the defendants, as hereinabove alleged, plaintiff Guy Endore ever since November, 1951, has been and he now is blacklisted and is refused and is excluded from employment in the motion picture industry by these defendants and all other employers in said industry. Therefore, said plaintiff will henceforth continue to find it impossible to obtain employment in the profession to which he has devoted a major part of his entire life and energy, unless the injunctive relief hereinafter prayed for is granted.

IV

By reason of the conspiracy and agreement of defendants as aforesaid, plaintiff Guy Endore has suffered and will continue to suffer damages as follows:

(a) For loss of opportunity of employment in the motion picture industry and deprivation of artistic and intellectual gratification flowing therefrom and the resulting humiliation and anguish, to his damage in the sum of $1,000,000.00.

(b) Said plaintiff has been required to make known the reasons for his blacklisting and inability to obtain employment in the motion picture industry thus jeopardizing his opportunity to obtain and retain employment in other industries in the future to his damage in the sum of $250,000.00.

(c) Defendants in doing the acts hereinabove alleged have acted maliciously, oppressively, wilfully, fraudulently

and wantonly and by reason thereof defendants should be required to pay plaintiff Guy Endore punitive damages [fol. 37] in the sum of $1,000,000.00.

(Clerk's Note. Entered Pursuant to Stipulation of Counsel)

"The 20th, 21st and 22nd causes of action in said complaint are identical with the 19th cause of action except for the name of the plaintiff in each cause of action, his or her number of years of experience and his or her profession, and the date of the appearance of each plaintiff before the House Committee on Un-American Activities. The facts as alleged on each of these matters are set forth in the table below:

Cause of Action No.	Name of Plaintiff	Occupation of Plaintiff in Motion Pictures and Length of Experience	Date of Committee Appearance
20th	Edward F. Huebsch	Writer, 5 yrs.	Spring 1951
21st	Frederic I. Rinaldo	Writer, 15 yrs.	January 1951
22nd	Louis Solomon	Writer, 5 yrs.	February 1951"

[fol. 42]

WHEREFORE, plaintiffs and each of them pray judgment against the defendants and each of them as follows:

1. For money damages in the amount of:

(a) $2,250,000.00 on the first cause of action;
(b) $2,250,000.00 on the second cause of action;
(c) $2,250,000.00 on the third cause of action;
(d) $2,250,000.00 on the fourth cause of action;
(e) $2,250,000.00 on the fifth cause of action;
(f) $2,250,000.00 on the sixth cause of action;
(g) $2,250,000.00 on the seventh cause of action;
(h) $2,250,000.00 on the eighth cause of action;
(i) $2,250,000.00 on the ninth cause of action;
[fol. 43] (j) $2,250,000.00 on the tenth cause of action;

(k) $2,250,000.00 on the eleventh cause of action;
(l) $2,250,000.00 on the twelfth cause of action;
(m) $2,250,000.00 on the thirteenth cause of action;
(n) $2,250,000.00 on the fourteenth cause of action;
(o) $2,250,000.00 on the fifteenth cause of action;
(p) $2,250,000.00 on the sixteenth cause of action;
(q) $2,250,000.00 on the seventeenth cause of action;
(r) $2,250,000.00 on the eighteenth cause of action;
(s) $2,250,000.00 on the nineteenth cause of action;
(t) $2,250,000.00 on the twentieth cause of action;
(u) $2,250,000.00 on the twenty-first cause of action;
(v) $2,250,000.00 on the twenty-second cause of action;
(w) $2,250,000.00 on the twenty-third cause of action.

2. For a permanent injunction perpetually restraining and enjoining the defendants herein, and each of them, their agents, servants or representatives, directly or indirectly by any means, method or device whatsoever (a) from maintaining any blacklist or policy of blacklisting or discriminating against the plaintiffs or any of them or others similarly situated with respect to employment in the motion picture industry; (b) from making, adopting or enforcing any rule, regulation or policy forbidding or preventing the plaintiffs and others similarly situated from claiming and relying upon their constitutional rights and privileges before the House Committee on Un-American Activities or before any other investigating committee, tribunal or other body; (c) from controlling or directing or attempting to control or direct the political activities of the plaintiffs or any of the employees of the motion picture producer defendants in any manner whatsoever; (d) from maintaining or enforcing in any way or for any purpose the combination and conspiracy referred to in the complaint herein for the purpose of or with the effect of discriminating in employment against the plaintiffs or any other persons.

3. For an order directing defendants herein to show [fol. 44] cause at a time and place designated in said order why they and each of them should not be enjoined and restrained during the pendency of this action from doing any of the things or acts set forth in paragraph 2 of this prayer.

4. For costs of suit herein.

5. For such other and further relief as the Court may deem just and equitable in the premises.

Kenny and Morris, By: Robert W. Kenny.
Margolis, McTernan and Branton, By: Ben Margolis.
Thomas G. Neusom.
William B. Esterman, Attorneys for Plaintiffs.

[fol. 45]
Duly sworn to by Edward F. Huebsch (jurat omitted in printing).

[fol. 46] In the Superior Court of the State of California in and for the County of Los Angeles. No. 610,835.

Michael Wilson, et al., Plaintiffs, vs. Loew's Incorporated, a corporation, et al., Defendants.

DEMURRER TO COMPLAINT

Come now the defendants Loew's Incorporated, Paramount Pictures, Inc., Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc., Warner Brothers Pictures, Inc., Republic Productions, Inc., Hal E. Roach Studios, Inc., T.C.F. Film Corporation (sued herein as Twentieth Century-Fox Film, Inc.) Universal Pictures Company, Inc. (sued herein as Universal Pictures Company), Warner Bros. Pictures Distributing Corp., United States Pictures, Inc., Sol Lesser Productions, Inc., Association of Motion Picture Producers, Inc. (sued herein as 1 Doe Co.), E. B. Mannix, Dore Schary, Harry M. Warner and Jack Warner, and each for itself or himself, as the case may be, and not for any other of the defendants, demurs as hereinafter set out to the complaint herein and separately to each of the causes of action thereof upon each of the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the demurring defendant.

FIRST CAUSE OF ACTION
(Wilson, Page 2 of Complaint)

II.

That the first cause of action of said complaint does not state facts sufficient to constitute a cause of action against the demurring defendant.

[fol. 47] III.

That the first cause of action of said complaint is uncertain in each of the following respects:

(a) The relationship of the individual defendants to the acts of which plaintiff complains cannot be ascertained and it cannot be determined whether each individual defendant acted as therein alleged in his individual capacity or as the employee of one or another of the corporate defendants.

(b) It cannot be ascertained how or in what manner plaintiff was injured by the alleged agreement of any individual defendant not to employ the persons whom it is alleged the individual defendants agreed not to employ.

(c) It cannot be ascertained whether plaintiff was named before the Committee as a Communist.

(d) It cannot be ascertained whether plaintiff was suspected of ever having been a Communist.

(e) It cannot be ascertained whether plaintiff was suspected of ever having any associations with Communists.

(f) It cannot be ascertained whether plaintiff was asked by the Committee whether plaintiff was a Communist.

(g) It cannot be ascertained whether plaintiff was asked by the Committee as to whether plaintiff was a Communist and refused or failed to answer the question.

(h) It cannot be ascertained how plaintiff was injured by the alleged agreement of the demurring defendant not to employ persons who were named before the Committee as Communists or who were suspected of ever having been Communists or of ever having any associations with Communists and who refused or failed to appear before said

Committee or its agents and waive and surrender their [fol. 48] alleged constitutional rights and privileges and testify or give statements fully disclosing their own political affiliations, associations and beliefs and those of their family, friends, associates and acquaintances.

(i) It cannot be ascertained how or in what manner plaintiff was injured by any alleged agreement of demurring defendant not to employ any person who refused to testify or give statements before the Committee disclosing the political affiliations, associations and beliefs of their family, friends, associates and acquaintances.

(j) It cannot be ascertained upon what rights or privileges under the Constitution, in addition to the privilege against self-incrimination, plaintiff relief in refusing to answer the questions addressed to plaintiff by the Committee.

(k) It cannot be ascertained what justified plaintiff in relying on the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States in refusing to answer questions concerning plaintiff's political affiliations, associations and beliefs or whether plaintiff was justified in refusing to answer such questions under said Fifth Amendment.

(l) It cannot be ascertained how or in what manner any questions addressed to plaintiff by the Committee related to plaintiff's political affiliations, associations or beliefs.

(m) It cannot be determined how or in what manner the demurring defendant acted wrongfully, maliciously or without justification in doing those things alleged to have been done by such defendant.

(n) It does not appear how the alleged position of plaintiffs that the Committee does not have the authority [fol. 49] to require an individual to surrender his constitutional privileges and rights justified the plaintiffs in refusing to answer the questions addressed to them by the Committee.

(o) It does not appear how plaintiffs intended to, were or are maintaining a political principle by conducting themselves as they did.

(p) It does not appear how or in what manner the alleged conspiracy seeks to limit, control or direct any political activities of the employees of the defendants or any of them.

(q) It does not appear how the alleged conspiracy is intended to coerce the employees of defendants from adopting or following any line of political action or activity not acceptable to the Committee or to limit employment in the motion picture industry to persons whose political beliefs are acceptable to the Committee.

(r) It does not appear how the alleged conspiracy, through any acts alleged to have been done or alleged to be intended by it will limit the production of motion pictures by said industry to those the content of which is acceptable to the said Committee.

(s) It cannot be ascertained how the alleged conspiracy to limit, control or direct any political activities of the employees of defendants or to coerce and influence such employees, through and by means of threat of discharge and loss of employment, to refrain from adopting or following any line of political action or activity not acceptable to the Committee has injured or will injure plaintiff.

(t) It cannot be ascertained how the alleged conspiracy to limit employment in the motion picture industry to persons whose political beliefs are acceptable to the Committee will injure plaintiff.

[fol. 50] (u) It cannot be ascertained how the alleged conspiracy to limit the production of motion pictures by the motion picture industry to those of which the content is acceptable to the Committee will injure plaintiff.

(v) It does not appear how the employment by the motion picture industry of the persons to whom it is alleged the conspiracy denies employment would result in the production of motion pictures by the industry with content which would be unacceptable to the Committee.

(w) It cannot be ascertained how or to what extent the alleged acts of demurring defendant have deprived plaintiff of any loss of opportunity of employment in the motion

picture industry to which plaintiff was entitled or how any damage resulting from such deprivation can be determined to be the sum alleged by plaintiff or any other sum.

(x) It cannot be ascertained how or to what extent the alleged acts of demurring defendant have deprived plaintiff of any artistic or intellectual gratification to which plaintiff was entitled or how any damage resulting from said deprivation can be determined to be the sum alleged by plaintiff or any other sum.

(y) It cannot be ascertained how or to what extent the alleged acts of the demurring defendant caused plaintiff to suffer the alleged humiliation or anguish or how any damages in that regard can be determined to be the sum alleged by plaintiff or any other sum.

(z) It cannot be ascertained how being required to make known the reasons for plaintiff's alleged blacklisting or inability to obtain employment in the motion picture industry has jeopardized plaintiff's opportunities or will jeopardize plaintiff's opportunities to obtain or retain em- [fol. 51] ployment in other industries or how any damages in that regard can be determined to be the sum alleged by plaintiff or any other sum.

(aa) It cannot be ascertained how or in what manner the demurring defendant acted maliciously, oppressively, wilfully, fraudulently or wantonly in doing those things alleged to have been done by such defendant.

(ab) It cannot be ascertained why the demurring defendant should be required to pay plaintiff punitive damages in any sum.

(ac) It cannot be ascertained why the full measure of damages alleged to have been suffered by plaintiff by reason of the alleged conduct of demurring defendant is not readily ascertainable or cannot be determined in terms of money.

(ad) It cannot be ascertained with what demurring defendant is charged by the allegation that plaintiff has been blacklisted.

(ae) It cannot be ascertained how the alleged acts of demurring defendant threaten great or irreparable damage to plaintiff or to any persons seeking employment who are similarly situated.

(af) The political activities, associations or beliefs of plaintiff cannot be ascertained nor can there be determined the difference between such activities, associations and beliefs and those of the Committee.

IV.

That the first cause of action of the complaint is ambiguous for the same reasons that it is uncertain, as hereinbefore set out.

[fol. 52]

V.

That the first cause of action of the complaint is unintelligible for the same reasons that it is uncertain, as hereinbefore set out.

(Clerk's Note. Inserted Pursuant to Stipulation of Counsel)

"The demurrer to the second to eighteenth causes of action, inclusive, and to the 23rd cause of action is identical as to each cause of action with the demurrer to the first cause of action."

[fol. 53]

NINETEENTH CAUSE OF ACTION
(Endore, Page 35 of Complaint)

LXXIV.

That the nineteen- cause of action of said complaint does not state facts sufficient to constitute a cause of action against the demurring defendant.

[fol. 54] LXXV.

That the nineteenth cause of action is uncertain in each of the following respects:

(a) The relationship of the individual defendants to the acts of which plaintiff complains cannot be ascertained and it cannot be determined whether each individual defendant acted as therein alleged in his individual capacity or as the employee of one or another of the corporate defendants.

(b) It cannot be ascertained how or in what manner plaintiff was injured by the alleged agreement of any individual defendant not to employ the persons whom it is alleged in Paragraph V the individual defendants agreed not to employ.

(c) It cannot be ascertained whether plaintiff was suspected of ever having any associations with Communists.

(d) It cannot be determined whether plaintiff was subpoenaed to appear before the Committee.

(e) It cannot be ascertained whether plaintiff appeared before the Committee.

(f) It cannot be ascertained whether plaintiff was asked by the Committee whether plaintiff was a Communist.

(g) It cannot be ascertained whether plaintiff was asked by the Committee as to whether plaintiff was a Communist and refused or failed to answer the question.

(h) It cannot be ascertained how plaintiff was injured by the alleged agreement of the demurring defendant not to employ persons who were subpoenaed as witnesses before the Committee and who refused to answer questions concerning their political affiliations, associations and beliefs.

[fol. 55] (i) It cannot be ascertained how plaintiff was injured by the alleged agreement of demurring defendant not to employ persons who were subpoenaed to appear as witnesses before the Committee and who refused or failed to appear before the Committee or its agents and waive

or surrender their alleged constitutional rights and privileges and testify or give statements disclosing their own political affiliations, associations and beliefs and those of their family, friends, associates and acquaintances.

(j) It cannot be ascertained how or in what manner plaintiff was injured by any alleged agreement of demurring defendant not to employ any person who refused to testify or give statements before the Committee disclosing the political affiliations, associations and beliefs of their family, friends, associates and acquaintances.

(k) It cannot be ascertained upon what constitutional rights other than the privilege against self-incrimination plaintiff refused to appear before the Committee and answer questions concerning plaintiff's political affiliations, beliefs and associations.

(l) It cannot be ascertained what justified plaintiff in relying on the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States in refusing to appear before the Committee to answer questions concerning plaintiff's political affiliations, beliefs and associations.

(m) It cannot be ascertained how or in what manner the questions which plaintiff refused to answer were related to plaintiff's political affiliations, beliefs or associations.

(n) It cannot be determined how or in what manner the demurring defendant acted wrongfully, maliciously or [fol. 56] without justification in doing those things alleged to have been done by such defendant.

(o) It does not appear how the alleged position of plaintiff that the Committee does not have the authority to require an individual to surrender his constitutional privileges and rights justified plaintiff in failing or refusing to appear before the Committee.

(p) It does not appear how plaintiff intended to maintain, was or is maintaining a political principle by plaintiff's conduct as alleged.

(q) It does not appear how or in what manner the alleged conspiracy seeks to limit, control or direct any political activities of the employees of the defendants or any of them.

(r) It does not appear how the alleged conspiracy is intended to coerce the employees of defendants from adopting or following any line of political action or activity not acceptable to the Committee or to limit employment in the motion picture industry to persons whose political beliefs are acceptable to the Committee.

(s) It does not appear how the alleged conspiracy, through any acts alleged to have been done or alleged to be intended by it will limit the production of motion pictures by said industry to those the content of which is acceptable to the said Committee.

(t) It cannot be ascertained how the alleged conspiracy to limit, control or direct any political activities of the employees of defendants, or to coerce and influence such employees, through and by means of threat of discharge and loss of employment, to refrain from adopting or following any line of political action or activity not acceptable to the Committee, has injured or will injure plaintiff.

[fol. 57] (u) It cannot be ascertained how the alleged conspiracy to limit employment in the motion picture industry to persons whose political beliefs are acceptable to the Committee will injure plaintiff.

(v) It cannot be ascertained how the alleged conspiracy to limit the production of motion pictures by the motion picture industry to those of which the content is acceptable to the Committee will injure plaintiff.

(w) It does not appear how the employment by the motion picture industry of the persons to whom it is alleged the conspiracy denies employment would result in the production of motion pictures by the industry with content which would be unacceptable to the Committee.

(x) It cannot be ascertained how or to what extent the alleged acts of demurring defendant have deprived plaintiff of any loss of opportunity of employment in the mo-

tion picture industry to which plaintiff was entitled or how any damage resulting from such deprivation can be determined to be the sum alleged by plaintiff or any other sum.

(y) It cannot be ascertained how or to what extent the alleged acts of demurring defendant have deprived plaintiff of any artistic or intellectual gratification to which plaintiff was entitled or how any damage resulting from said deprivation can be determined to be the sum alleged by plaintiff or any other sum.

(z) It cannot be ascertained how or to what extent the alleged acts of the demurring defendant caused plaintiff to suffer the alleged humiliation or anguish or how any damages in that regard can be determined to be the sum alleged by plaintiff or any other sum.

(aa) It cannot be ascertained how being required to make known the reasons for plaintiff's alleged blacklisting [fol. 58] or inability to obtain employment in the motion picture industry has jeopardized plaintiff's opportunities or will jeopardize plaintiff's opportunities to obtain or retain employment in other industries or how any damages in that regard can be determined to be the sum alleged by plaintiff or any other sum.

(ab) It cannot be ascertained how or in what manner the demurring defendant acted maliciously, oppressively, wilfully, fraudulently or wantonly in doing those things alleged to have been done by such defendant.

(ac) It cannot be ascertained why the demurring defendant should be required to pay plaintiff punitive damages in any sum.

(ad) It cannot be ascertained why the full measure of damages alleged to have been suffered by plaintiff by reason of the alleged conduct of demurring defendant is not readily ascertainable or cannot be determined in terms of money.

(ae) It cannot be ascertained with what demurring defendant is charged by the allegation that plaintiff has been black-listed.

(af) It cannot be ascertained how the alleged acts of demurring defendant threaten great or irreparable damage to plaintiff or to any persons seeking employment who are similarly situated.

(ag) The political activities, associations or beliefs of plaintiff cannot be ascertained nor can there be determined the difference between such activities, associations and beliefs and those of the Committee.

[fol. 59] LXXVI.

That the nineteenth cause of action of the complaint is ambiguous for the same reasons that it is uncertain, as hereinbefore set out.

LXXVII.

That the nineteenth cause of action of the complaint is unintelligible for the same reasons that it is uncertain, as hereinbefore set out.

(Clerk's Note. Entered Pursuant to Stipulation of Counsel)

"The demurrer to the 20th, 21st and 22nd causes of action is identical with that to the 19th cause of action."

* * * * * * *

[fol. 60] Wherefore, each of the demurring defendants prays that plaintiffs take nothing by their complaint and that such defendant have judgment for his costs incurred herein.

Irving M. Walker, Herman F. Selvin, By Irving M. Walker, Attorneys for defendant Association of Motion Picture Producers, Inc. (sued herein as 1 Doe Co.).

Loeb and Loeb, By Irving M. Walker, Attorneys for defendants Loew's Incorporated, Republic Productions, Inc., Sol Lesser Productions, Inc., E. B. Mannix and Dore Schary.

O'Melveny & Myers, By Irving M. Walker, Attorneys for defendant Paramount Pictures, Inc.

Mitchell, Silberberg & Knupp, By Irving M. Walker, Attorneys for defendants Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc. and Hal E. Roach Studios, Inc.

[fol. 61] Freston & Files, By Irving M. Walker, Attorneys for defendants Warner Brothers Pictures, Inc., Warner Bros. Pictures Distributing Corp., Harry M. Warner and Jack Warner.

Wright, Peeler & Garrett, By Irving M. Walker, Attorneys for defendant T.C.F. Film Corporation (sued herein as Twentieth Century-Fox Film, Inc.).

Joseph S. Dubin, By Irving M. Walker, Attorney for defendant Universal Pictures Company, Inc. (sued herein as Universal Pictures Company).

Oliver B. Schwab, By Irving M. Walker, Attorney for defendant United States Pictures, Inc.

I hereby certify that I am attorney for one of the defendants herein; that this demurre is made in good faith and in my opinion is well taken.

Irving M. Walker

N.B. A Notice of Motion to Strike, specifying July 17, 1953, for hearing is being filed concurrently with this Demurrer.

[fol. 62] In the Superior Court of the State of California, In and for the County of Los Angeles

Excerpt From Memorandum of Points and Authorities in Support of Demurrer and Motion to Strike

III.

The complaint does not state facts sufficient to constitute a cause of action for interference with business relations. No existing contract between plaintiffs and any of the defendants is alleged. Consequently, there must be shown a reasonable probability that, but for the alleged interference, business relations between the parties would have been entered into. It is not enough that plaintiffs

hoped or even expected that such relations might eventuate, the fact that they would have eventuated must appear.

"Before recovery can be had for interference with and loss of a prospective business relationship or contract, it is held that it must appear that such relationship or contract would otherwise have been entered into."

Annotation, 9 A. L. R. 2d 256-257, and cases there cited.

[fol. 64] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

MINUTE ORDER OF OCTOBER 5, 1953

General Demurrers (22) to Each Cause of Action Sustained, 30 Days to Amend

Demurrer of defendants Loew's Incorporated, Paramount Pictures, Inc., Columbia Pictures Corporation, RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Republic Productions, Inc., Hal E. Roach Studios, Inc., TCF Film Corporation (sued herein as Twentieth Century-Fox Film, Inc.), Universal Pictures Company, Inc. (sued herein as Universal Pictures Company), Warner Bros. Pictures Distributing Corp., United States Pictures, Inc., Sol Lesser Productions, Inc., Association of Motion Picture Producers, Inc. (sued herein as 1 Doe Co.), E. B. Mannix, Dore Schary, Harry M. Warner and Jack Warner, to complaint. (Submitted July 17, 1953)

Motion Off Calendar

Motion of defendants Loew's Incorporated, Paramount Pictures, Inc., Columbia Pictures Corporation, RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Republic Productions, Inc., Hal E. Roach Studios, Inc., TCF Film

Corporation (sued herein as Twentieth Century-Fox, Inc.), Universal Pictures Company, Inc. (sued herein as Universal Pictures Company), Warner Bros. Pictures Distributing Corp., United States Pictures, Inc., Sol Lesser Productions, Inc., Association of Motion Picture Producers, Inc. (sued herein as 1 Doe Co.), E. B. Mannix, Dore Schary, Harry M. Warner and Jack Warner, to strike from complaint.

(Submitted July 17, 1953)

[fol. 65] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

No. 610835

[Title omitted]

FIRST AMENDED COMPLAINT—Filed October 19, 1953

[fol. 66]

* * * * * * *

Plaintiff Michael Wilson in this first cause of action complains of defendants above named and alleges:

I

Plaintiff is by profession a motion picture writer and has had more than five years experience in working as a writer and has acquired a reputation for excellence of work in the motion picture industry and has won high esteem as a writer in said industry, all of which defendants at all times herein mentioned well knew.

II

Defendant Loew's Incorporated is a corporation organized under the laws of the state of Delaware. Defendant Loew's Incorporated is engaged in the production and dis-
[fol. 67] tribution of motion pictures. It has principal offices in Culver City, in the County of Los Angeles, State of California, and in New York City in the State of New York. It owns and operates facilities for the production

of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California, in New York, in other States in the United States, and in London, England.

Defendant Paramount Pictures, Inc., is a corporation organized under the laws of New York. Defendant Paramount Pictures, Inc. is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, State of California, and in New York City in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California, in New York, and in other States in the United States.

Defendant Columbia Pictures Corporation is a corporation organized under the laws of New York. Defendant Columbia Pictures Corporation is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, County of Los Angeles, State of California, and in New York City in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California, in New York, and in other States in the United States.

Defendant R.K.O. Radio Pictures, Inc. is a corporation organized under the laws of Delaware. Defendant R.K.O. Radio Pictures, Inc. is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, County of Los Angeles, State of California. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California, in New York, and in other States of the United States.

Defendant Warner Brothers Pictures, Inc. is a corporation organized under the laws of Delaware. Defendant [fol. 68] Warner Brothers Pictures, Inc. is engaged in the production and distribution of motion pictures. It has principal offices in the City of Burbank, County of Los Angeles, State of California, and in New York City in the

State of New York. It owns and operates facilities for the production of motion pictures and for the distribution of motion pictures in California, in New York, and in other States in the United States.

Defendant Republic Productions, Inc. is a corporation organized under the laws of New York and Delaware. Defendant Republic Productions, Inc. is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, County of Los Angeles, State of California, and in New York City in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in California.

Defendant Samuel Goldwyn Studios, Inc. is a corporation organized under the laws of Delaware. Defendant Samuel Goldwyn Studios, Inc. is engaged in the production and distribution of motion pictures. Its principal office is in the City of Los Angeles, County of Los Angeles, State of California. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in Los Angeles.

Defendant Hal E. Roach Studio, Inc. is a corporation organized under the laws of California. Defendant Hal E. Roach Studio, Inc. is engaged in the production and distribution of motion pictures. Its principal office is in the City of Culver City, County of Los Angeles, State of California. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in Los Angeles.

Defendant Twentieth Century-Fox Film Corporation is a corporation organized under the laws of New York. Defendant Twentieth Century-Fox Film Corporation is engaged in the production and distribution of motion pictures. It has principal offices in the City of Los Angeles, State of [fol. 69] California, and in New York City in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion

pictures in California, in New York, and in other States in the United States.

Defendant Universal Pictures Company, Inc. is a corporation organized under the laws of the State of Delaware. Defendant Universal Pictures Company, Inc. is engaged in the production and distribution of motion pictures. It has principal offices in Universal City, County of Los Angeles, State of California, and in New York City, in the State of New York. It owns and operates facilities for the production of motion pictures and for the rendition of services incidental to the production and the distribution of motion pictures in Los Angeles County, California, and in New York and in other States.

Plaintiff is informed and believes and upon such information and belief alleges that defendant, Warner Bros. Pictures Distribution Corp. is a wholly owned subsidiary of defendant Warner Brothers Pictures, Inc. and is the agent of defendant Warner for the distribution of motion pictures produced by Warner Brothers Pictures, Inc. Warner Bros. Pictures Distribution Corp. has its principal offices in the State of California and in other states of the United States.

Plaintiff is informed and believes and upon such information and belief alleges that defendant Goldwyn distributes motion pictures produced by it through defendant R.K.O. Radio Pictures, Inc.; further on information and belief plaintiff alleges that defendant Hal E. Roach Studio, Inc. distributes motion pictures produced by it through Loew's Incorporated.

Defendant Wald-Krasna Productions, Inc. is a California corporation engaged in the production and distribution of motion pictures.

Defendant United States Pictures, Inc. is a California corporation engaged in the production and distribution of motion pictures.

Defendant Stanley Kramer Company is a California corporation engaged in the production and distribution of motion pictures.

Defendant Sol Lesser Productions, Inc. is a California [fol. 70] corporation engaged in the production and distribution of motion pictures.

Defendant Citadel Pictures is a California corporation engaged in the production and distribution of motion pictures.

Defendant Motion Picture Association of America, Inc., is a corporation organized by the defendant production companies named in this paragraph II. Its principal office is located in the City of Los Angeles, State of California.

Defendant Society of Independent Motion Picture Producers is a corporation with its principal office and place of business in the County of Los Angeles, State of California.

Plaintiff is informed and believes, and upon such information and belief alleges: That the defendants 1 Doe Co., a corporation; 2 Doe Co., a corporation; 3 Doe Co., a corporation; 4 Doe Co., a corporation; 5 Doe Co., a corporation; 6 Doe Co., a corporation; 7 Doe Co., a corporation; 8 Doe Co., a corporation; 9 Doe Co., a corporation; 10 Doe Co., a corporation; 11 Doe Co., a corporation; 12 Doe Co., a corporation; 13 Doe Co., a corporation; 14 Doe Co., a corporation; and 15 Doe Co., a corporation, are and each of them is a corporation duly organized and existing. 16 Doe Co. is a co-partnership composed of the defendants 17 Doe and 18 Doe, co-partners; the defendant 19 Doe Co. is a co-partnership composed of the defendants 20 Doe and 21 Doe, co-partners; the defendant 22 Doe Co. is a co-partnership composed of the defendants 23 Doe and 24 Doe, co-partners; the defendant 25 Doe Co. is a co-partnership composed of the defendants 26 Doe and 27 Doe, co-partners; the defendant 28 Doe Co. is a co-partnership composed of the defendants 29 Doe and 30 Doe, co-partners.

Plaintiff does not know the true names of the defendants sued herein under the fictitious names of 1 Doe Co., a corporation; 2 Doe Co., a corporation; 3 Doe Co., a corporation; 4 Doe Co., a corporation; 5 Doe Co., a corporation; 6 Doe Co., a corporation; 7 Doe Co., a corporation; 8 Doe Co., a corporation; 9 Doe Co., a corporation; 10 Doe Co., a corporation; 11 Doe Co., a corporation; 12 Doe Co., a corporation; 13 Doe Co., a corporation; 14 Doe Co., a corporation; 15 Doe Co., a corporation; 16 Doe Co., a co-
[fol. 71] partnership composed of 17 Doe and 18 Doe, co-partners; 19 Doe Co., a co-partnership composed of 20 Doe

and 21 Doe, co-partners; 22 Doe Co., a co-partnership composed of 23 Doe and 24 Doe, co-partners; 25 Doe Co., a co-partnership composed of 26 Doe and 27 Doe, co-partners; 28 Doe Co., a co-partnership composed of 29 Doe and 30 Doe, co-partners; 31 Doe, 32 Doe, 33 Doe, 34 Doe, 35 Doe, 36 Doe, 37 Doe, 38 Doe, 39 Doe, 40 Doe, 41 Doe, 42 Doe, 43 Doe, 44 Doe, 45 Doe, 46 Doe, 47 Doe, 48 Doe, 49 Doe, 50 Doe; on discovery of the true names of said defendants so sued under said fictitious names, plaintiff will seek leave to amend this complaint by inserting the true names of such defendants in the place and stead of such fictitious names.

Each of the defendants L.B. Mayer, Howard Hughes, E. J. Mannix, Y. Frank Freeman, Henry Ginsberg, Harry Cohn, Ben B. Kahane, Dore Schary, Harry M. Warner, Jack Warner, Herbert J. Yates, Samuel Goldwyn, Hal E. Roach, Walter Wanger, Joseph M. Schenck, Stanley E. Kramer, Sol Lesser, Leo Spitz, Daryl Zanuck and James Grainger is now, and at all times herein mentioned was a resident of the County of Los Angeles, State of California.

Between them, the said defendants control, directly and indirectly all motion picture production and distribution in the United States of America and likewise control, directly and indirectly, all motion picture employment opportunities in the United States of America for actors, writers, directors, producers and other employees in the motion picture industry.

III

At all times herein mentioned defendant John S. Wood was the chairman of the Committee on Un-American Activities, United States House of Representatives; defendants Francis E. Walter, Morgan M. Moulder, Clyde Doyle, James B. Frazier, Harold E. Velde, Barnard W. Kearney, Donald L. Jackson and Charles E. Potter were members of the said Committee; Louis J. Russell was Senior Investigator of said Committee; William Wheeler was an investigator of said Committee and 41 Doe, 42 Doe, 43 Doe, 44 Doe, 45 Doe, 46 Doe, 47 Doe, 48 Doe, 49 Doe and 50 Doe were representatives of said Committee.

At all times mentioned herein and with respect to the [fol. 72] matters hereinafter alleged the defendants named

in the preceding paragraph acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities.

IV

All of the plaintiffs herein have the right to relief herein in respect to and as a result of the same series of acts of defendants hereinafter complained of, and if the plaintiffs brought separate actions, questions both of law and of fact common to all of the parties to this action would arise.

V

On and prior to March, 1951, and continuously thereafter defendants and each of them agreed with each other to refuse employment to and exclude from employment in the motion picture industry all employees and persons seeking employment in the motion picture industry who had been or thereafter were subpoenaed as witnesses before the Committee on Un-American Activities of the House of Representatives and who, relying on their rights and privileges under the Constitution of the United States including the privilege against self-incrimination under the Fifth Amendment to said Constitution, refused to answer questions concerning their political affiliations, associations and beliefs, and all employees in the motion picture industry and persons seeking employment therein who were named before said Committee as Communists or who were subpoen-ed to appear as witnesses before said Committee or who were suspected of ever having been Communists or of ever having any associations with Communists and who refused or failed to appear before said Committee or its agents and waive and surrender their constitutional rights and privileges and testify or give statements fully disclosing their own political affiliations, associations and beliefs and those of their family, friends, associates and acquaintances; and defendants agreed that [fol. 73] such employees and other persons would not be employed in the motion picture industry; thereupon defendants and each of them with the intent to prevent such employees and other persons from having or obtaining

employment in the motion picture industry maliciously and without justification undertook to and did induce and persuade each other and other employers in the motion picture industry to desist and refrain from employing and to refuse employment to all such employees and other persons. As a part of said agreement and as one of the means of effectuating it all of the defendants have published and circulated and are now publishing and circulating throughout the entire motion picture production, distribution and exhibition fields a list containing the names of such employees and other persons with the direction and intent that they be not employed. That the defendants and each of them by this conduct wrongfully, maliciously and without justification or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the motion picture industry and to pursue their professions and occupations therein, and have prevented their employment therein.

VI

On the 20th day of September, 1951, plaintiff Michael Wilson appeared as a witness before the said Committee on Un-American Activities pursuant to subpoena theretofore served upon him. At said time plaintiff refused to answer certain questions concerning his political affiliations, beliefs and associations, basing his refusal upon his constitutional rights, including the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. As a result thereof and by reason of the acts of and pursuant to the agreement of the defendants, as hereinabove alleged, plaintiff Michael Wilson ever since September 20, 1951, has been and he now is refused and is excluded from employment in said industry. Therefore, said plaintiff will henceforth continue to find it impossible to obtain employment in the profession to which [fol. 74] he has devoted a major part of his entire life and energy, unless the injunctive relief hereinafter prayed for is granted.

VII

Plaintiffs allege that it was and is their belief, and it is a fact that it is the purpose of the agreement hereinabove described to limit, control and direct the political activities of their employees and to coerce and influence said employees through and by means of threat of discharge and loss of employment to refrain from adopting or following any course or line of political action and activity not acceptable to the said Committee, to limit employment in the motion picture industry to those persons whose political beliefs are acceptable to the said Committee and to limit the production of motion pictures by said industry to those the content of which is acceptable to the said Committee.

VIII

By reason of the agreement of defendants, as aforesaid, plaintiff Michael Wilson has suffered and will continue to suffer damages as follows:

(a) For loss of opportunity of employment in the motion picture industry and deprivation of artistic and intellectual gratification flowing therefrom and the resulting serious humiliation and anguish in the sum of $1,000,000.00.

(b) Said plaintiff has been required to and will in the future be required to make known the reasons for his inability to obtain employment in the motion picture industry [fol. 75] thus jeopardizing his opportunities to obtain and retain employment in other industries in the future to his damage in the sum of $250,000.00.

(c) Defendants in doing the acts hereinabove alleged have acted maliciously, oppressively, wilfully, fraudulently and wantonly, and by reason thereof defendants should be required to pay plaintiff Michael Wilson punitive damages in the sum of $1,000,000.00.

IX

The full measure of damages suffered by plaintiffs by reason of the conduct of defendants hereinabove set forth are not readily ascertainable and such damages cannot be

measured in terms of money damages alone; defendants by their conduct, as aforesaid, threaten great and irreparable damage to all of the plaintiffs and to all employees of the motion picture industry and persons seeking employment therein similarly situated; such conduct of defendants will lead to a multiplicity of suits unless restrained and enjoined by this Court; defendants threaten to and will, unless restrained by this Court, continue to commit the acts hereinabove alleged, and plaintiffs and each of them are without any plain, speedy or adequate remedy at law.

(Clerk's Note. Inserted Pursuant to Stipulation of Counsel)

"The second to eighteenth causes of action, inclusive, and the twenty-third cause of action in said first amended complaint are identical with the first cause of action except for the name of the plaintiff in each cause of action, his or her number of years of experience and his or her profession, and the date of the appearance of each plaintiff before the House Committee on Un-American Activities, all as more specifically set forth with respect to the original complaint herein."

[fol. 99]

(Clerk's Note. Inserted Pursuant to Stipulation of Counsel)

"The 20th, 21st and 22nd causes of action in said first amended complaint are identical with the 19th cause of action except for the name of the plaintiff in each cause of action, his or her number of years of experience and his or her profession, and the date of the appearance of each plaintiff before the House Committee on Un-American Activities, all as more specifically set forth with respect to the original complaint herein."

[fol. 100]

III

During the month of November, 1951, plaintiff Guy Endore was named as a Communist by a witness appearing before the said Committee on Un-American Activities. At all times plaintiff has failed and refused to appear before the said committee to answer questions concerning his political affiliations, beliefs and associations, basing his refusal upon his constitutional rights, including the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. As a result thereof and by reason of the acts of and pursuant to the agreement of the defendants, as hereinabove alleged, plaintiff Guy Endore ever since November, 1951, has been and he now is refused and is excluded from employment in the motion picture industry by these defendants and all other employers in said industry. Therefore, said plaintiff will henceforth continue to find it impossible to obtain employment in the profession to which he has devoted a major part of his entire life and energy, unless the injunctive relief hereinafter prayed for is granted.

IV

By reason of the agreement of defendants as aforesaid, plaintiff Guy Endore has suffered and will continue to suffer damages as follows:

(a) For loss of opportunity of employment in the motion picture industry and deprivation of artistic and intellectual gratification flowing therefrom and the resulting humiliation and anguish, to his damage in the sum of $1,000,000.00.

(b) Said plaintiff has been required to make known the reasons for his inability to obtain employment in the motion picture industry thus jeopardizing his opportunity to obtain and retain employment in other industries in the future to his damage in the sum of $250,000.00.

(c) Defendants in doing the acts hereinabove alleged have acted maliciously, oppressively, wilfully, fraudulently and wantonly and by reason thereof defendants should be

required to pay plaintiff Guy Endore punitive damages [fol. 101] in the sum of $1,000,000.00.

. . . . . .

[fol. 106]

. . . . . .

WHEREFORE, plaintiffs and each of them pray judgment against the defendants and each of them as follows:

1. For money damages in the amount of:

(a) $2,250,000.00 on the first cause of action;
(b) $2,250,000.00 on the second cause of action;
(c) $2,250,000.00 on the third cause of action;
(d) $2,250,000.00 on the fourth cause of action;
(e) $2,250,000.00 on the fifth cause of action;
(f) $2,250,000.00 on the sixth cause of action;
(g) $2,250,000.00 on the seventh cause of action;
(h) $2,250,000.00 on the eighth cause of action;
(i) $2,250,000.00 on the ninth cause of action;
[fol. 107] (j) $2,250,000.00 on the tenth cause of action;
(k) $2,250,000.00 on the eleventh cause of action;
(l) $2,250,000.00 on the twelfth cause of action;
(m) $2,250,000.00 on the thirteenth cause of action;
(n) $2,250,000.00 on the fourteenth cause of action;
(o) $2,250,000.00 on the fifteenth cause of action;
(p) $2,250,000.00 on the sixteenth cause of action;
(q) $2,250,000.00 on the seventeenth cause of action;
(r) $2,250,000.00 on the eighteenth cause of action;
(s) $2,250,000.00 on the nineteenth cause of action;
(t) $2,250,000.00 on the twentieth cause of action;
(u) $2,250,000.00 on the twenty-first cause of action;
(v) $2,250,000.00 on the twenty-second cause of action;
(w) $2,250,000.00 on the twenty-third cause of action.

2. For a permanent injunction perpetually restraining and enjoining the defendants herein, and each of them, their agents, servants or representatives, directly or indirectly by any means, method or device whatsoever (a) from maintaining any blacklist or policy of blacklisting or discriminating against the plaintiffs or any of them or

others similarly situated with respect to employment in the motion picture industry; (b) from making, adopting or enforcing any rule, regulation or policy forbidding or preventing the plaintiffs and others similarly situated from claiming and relying upon their constitutional rights and privileges before the House Committee on Un-American Activities or before any other investigating committee, tribunal or other body; (c) from controlling or directing or attempting to control or direct the political activities of the plaintiffs or any of the employees of the motion picture producer defendants in any manner whatsoever; (d) from maintaining or enforcing in any way or for any purpose the combination and conspiracy referred to in the complaint herein for the purpose of or with the effect of discriminating in employment against the plaintiffs or any other persons.

3. For an order directing defendants herein to show [fol. 108] cause at a time and place designated in said order why they and each of them should not be enjoined and restrained during the pendency of this action from doing any of the things or acts set forth in paragraph 2 of this prayer.

4. For costs of suit herein.

5. For such other and further relief as the Court may deem just and equitable in the premises.

Kenny and Morris, By Robert W. Kenny.
Margolis, McTernan and Branton, By Ben Margolis.
Thomas G. Neusom.
William B. Esterman, Attorneys for Plaintiffs.

[fol. 110] In the Superior Court of the State of California in and for the County of Los Angeles

[Title omitted]

Demurrer to Amended Complaint

Come now the defendants Loew's Incorporated, Paramount Pictures, Inc., Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc., Warner Brothers Pictures,

Inc., Republic Productions, Inc., Hal E. Roach Studios, Inc., T.C.F. Film Corporation (sued herein as Twentieth Century-Fox Film, Inc.), Universal Pictures Company, Inc. (sued herein as Universal Pictures Company), Warner Bros. Pictures Distributing Corp., United States Pictures, Inc., Sol Lesser Productions, Inc., Association of Motion Picture Producers, Inc. (sued herein as 1 Doe Co.), E. B. Mannix, Dore Schary, Harry M. Warner and Jack Warner, and each for itself or himself, as the case may be, and not for any other of the defendants, demurs as hereinafter set out to the complaint herein and separately to each of the causes of action thereof upon each of the following grounds:

I

That said complaint does not state facts sufficient to constitute a cause of action against the demurring defendant.

[fol. 111] First Cause of Action
(Wilson, Page 2 of complaint)

II

That the first cause of action of said complaint does not state facts sufficient to constitute a cause of action against the demurring defendant.

(Clerk's Note. Inserted Pursuant to Stipulation of Counsel)

"The foregoing demurrer is identical with respect to each of the 23 causes of action in the first amended complaint."

[fol. 135]

* * * * * * *

Wherefore, each of the demurring defendants prays that plaintiffs take nothing by their complaint and that such defendant have judgment for his costs incurred herein.

Irving M. Walker, Herman F. Selvin, By Irving M. Walker, Attorneys for defendant Association of Motion Picture Producers, Inc. (sued herein as 1 Doe Co.).

Loeb and Loeb, By Irving M. Walker, Attorneys for defendants Loew's Incorporated, Republic Productions, Inc., E. B. Mannix and Dore Schary.

O'Melveny & Myers, By Irving M. Walker, Attorneys for defendant Paramount Pictures, Inc.

Mitchell, Silberberg & Knupp, By Irving M. Walker, Attorneys for defendants Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc., Sol Lesser Productions, Inc. and Hal E. Roach Studios, Inc.

Freston & Files, By Irving M. Walker, Attorneys for defendants Warner Brothers Pictures, Inc., Warner Bros. Pictures Distributing Corp., Harry M. Warner and Jack Warner.

[fol. 136] Wright, Peeler & Garrett, By Irving M. Walker, Attorneys for defendant T.C.F. Film Corporation (sued herein as Twentieth Century-Fox Film, Inc.).

Joseph S. Dubin, By Irving M. Walker, Attorney for defendant Universal Pictures Company, Inc. (sued herein as Universal Pictures Company).

Oliver B. Schwab, By Irving M. Walker, Attorney for defendant United States Pictures, Inc.

I hereby certify that I am attorney for one of the defendants herein; that this demurrer is made in good faith and in my opinion is well taken.

Irving M. Walker

N.B. A Notice of Motions to Strike, specifying November 18, 1953 for hearing, is being filed concurrently with this Demurrer.

[fol. 139] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

No. 610 835

MICHAEL WILSON, et al., Plaintiffs,

v.

LOEW'S INCORPORATED, et al., Defendants.

MEMORANDUM RULINGS—July 9, 1954

This cause requires consideration of an alleged agreement not to employ plaintiffs in the motion picture industry, an alleged inducement of that agreement, the nature of the privilege to refuse to answer questions on the ground of self-incrimination and alleged refusals, on that ground, to appear before a congressional committee.

The amended complaint principally differs from the original, to which demurrers were sustained, in that the words "conspiracy" and "blacklisting" have been eliminated and the word "maliciously" has been added. Forty-one of the forty-four pages are the same mimeographed pages with here and there the above words penciled out.

In considering the several questions it will be convenient to divide the plaintiffs into two classes, those, eighteen in number, who appeared before the committee on un-American activities of the United States House of Representatives and refused to answer "certain questions" as to their activities and affiliations on the ground that the answers [fol. 140] would tend to incriminate themselves and those, five in number, as to whom it is alleged they had been named as communists by previous witnesses and refused to appear before the committee upon the ground of self-incrimination. Likewise, it will be convenient to consider the defendants in two groups, those who are alleged to be motion picture producers and distributors and the three,

two of whom are members of and the third an investigator for the congressional committee.

The plaintiffs have not alleged the existence of any contract with any defendant or third person or attempted any conventional allegations of restraint of trade. The cause of action attempted on behalf of each plaintiff has been based upon an agreement, and the inducement thereof, to refuse employment in the motion picture industry to all persons who: (1) are subpoenaed as witnesses before said un-American activities committee and refuse to answer questions as to their affiliations, associations and beliefs upon the ground that their answers would incriminate themselves, or (2) are so subpoenaed and fail or refuse to appear.

The first question which will be considered is whether the amended complaint states facts sufficient to constitute a cause of action for damages or an injunction against the larger class of defendants, those who are alleged to be motion picture producers and distributors.

The gist of the causes of action attempted against these defendants is not found in any California statute or judicial decision. Its genesis would appear to be section 765 of the Restatement of Torts: "(1) Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable for that harm, even though they would not be liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances."

The above section, apparently, has not been referred to [fol. 141] in any judicial decision in this or any other state although there are decisions which approach the field.

Consideration has led to the acceptance of the proposed rule although there are cogent arguments which might be presented against its acceptance.

The tort described in the section does not consist alone of the agreement not to enter into business relations, the proposed rule is that liability exists "if their concerted refusal is not justified under the circumstances." Lack of justification is a part of the tort, not merely a matter of defense. This conclusion rests upon three separate premises: (1) The statement of the rule itself, (2) the fact that

it is an exception to the broader rule of non-liability stated in section 762 of the restatement and (3) by analogy to the holding in *Speegle* v. *Board of Fire Underwriters,* 29 Cal. (2) 34.

In the Speegle case, decided on demurrer, the alleged tort was of greater degree, interference with existing contractual relationships, but the following language (pp. 40-41) is pertinent: "Collective bargaining . . . is carried on in recognition of the fact that employers as well as employees may organize for the purpose of furthering their common interests and that such organizations may bring pressure upon their members to include in their contracts certain terms and conditions or to terminate contracts that do not contain such terms and conditions. . . . Defendants' activities would be for an unlawful purpose, however, and would not be justified, if their objective was to stifle competition by enforcing a scheme to restrain trade (Rest. Torts, sec. 768 (c).) The answer to the question whether defendants are liable for interference with plaintiff's contractual relations therefore depends upon whether plaintiff has stated a good cause of action against defendants for injury to his business by activities in restraint of trade. Has plaintiff properly raised in his pleadings the question [fol. 142] of defendants' liability for restraint of trade?"

In the present case the question is, have plaintiffs properly raised in their pleadings the question of defendants' liability for a concerted refusal without justification under the circumstances?

The answer requires a consideration of the privilege to refuse self-incrimination, the scope of the fifth amendment to the Constitution and the privilege as embodied in the California constitution and laws.

The history of the privilege to refuse to answer a question on the ground that the answer would tend to incriminate the witness has been set forth in *Twining* v. *New Jersey,* 211 U.S. 78; 53 L. Ed. 97 and in greater detail in Wigmore on Evidence, section 2251. Briefly, it may be stated that it was unknown at the time of Magna Carta; it was not mentioned in the Petition of Rights (1629), the Bill of Rights (1689), by our Continental Congress or in the original draft of the Constitution. It developed as a

rule of evidence in the English law courts during a period of their conflict with the ecclesiastical courts, wherein the privilege was unknown. It is not improbable that its origin was influenced by those jurisdictional rivalries, for it was not an age marked by concern for those charged with crime or called as witnesses. (Later writers base it upon the morality of the judicial process.) The English bankruptcy courts have not granted it to a bankrupt even if criminal charges were pending against him. It is peculiar to the British Isles and those countries which have taken the common law thence. It was incorporated in some early American state constitutions and into the fifth amendment to the Constitution on the insistance of only four of the original thirteen states.

Exemption from self-incrimination is not a part of due process of law or a privilege or immunity of national citizenship. In the leading case of *Twining v. New Jersey*, supra, it was held: "Even if the historical meaning of due process and the decisions of this court did not exclude it, it would be going far to rate it as an immutable possession of every citizen of a free government. . . . The wisdom of [fol. 143] the exemption has never been universally assented to since the days of Bentham, many doubt it today and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient."

As recently as *Adamson* v. *California*, 332 U.S. 46, 91 L. Ed. 1903, it was held (p. 53):

> "We reaffirm the conclusion of the Twining and Palko cases that protection against self-incrimination is not a privilege or immunity of national citizenship." (cf. *Louisiana* v. *Resweber*, 329 U.S. 459; *Brock* v. *North Carolina*, 344 U.S. 324.)

It has frequently been contended, in the above and other cases, that some state action or authorized procedure impaired the protection against self-incrimination afforded by the fifth amendment to the Constitution. The Supreme Court of the United States has consistently held that said fifth amendment is "restrictive only of national action." It has held that the states are free to grant or withhold the

privilege against self-incrimination (cf. concurring opinion of Mr. Justice Frankfurter in *Louisiana* v. *Resweber*, supra), that they might adopt the civil law (*HOlden* v. *Harby*, 169 U.S. 387; *Maxwell* v. *Dow*, 176 U.S. 581) wherein self-incrimination is compelled (*Twining* v. *New Jersey*, supra).

It is necessary therefore to turn to the law of California to measure the right asserted by the plaintiffs herein, for the fifth amendment extended no farther than to prevent the congressional committee from compelling plaintiffs to answer questions if the answers tended to incriminate plaintiffs. It is necessary to turn to the law of California to evaluate plaintiffs' rights for another reason. Plaintiffs contend that the alleged agreement among these defendants prevents plaintiffs from p rsuing their several callings in the motion picture industry. Ever since the Slaughterhouse [fol. 144] cases (16 Wall. 36; 21 L. Ed. 394) it has been held that the right to engage in a trade, business or calling is not a privilege or immunity of national citizenship, but of state citizenship (*Twining* v. *New Jersey*, supra).

The privilege afforded by California relative to self-incrimination is to be found in the following words of section thirteen of article one of our constitution: "No person shall . . . be compelled, in any criminal case, to be a witness against himself; but in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury . . ."

The first portion of the above quotation antedates 1934, at which time the second portion was adopted. Prior to 1934 it had been settled that the words "in any criminal case" were not limited to their ordinary meaning, but also included civil actions, grand jury and legislative committee hearings. The use of identical words in the 1934 amendment must be given the same interpretation. The privilege granted and its burden are coextensive.

In a California criminal prosecution the defendant's failure to deny or explain by his testimony evidence or facts against him leads to the result "that among the inferences that may reasonably be drawn therefrom, those un-

favorable to the defendant are the more probable" (*People* v. *Adamson*, 27 Cal. (2) 478; aff. 332 U.S. 46).

No reason occurs why comment and consideration by counsel, court and jury should be permissible in the forum of criminal prosecutions, but a concert of conduct in the forum of business enjoined. If the court or jury may draw unfavorable inferences in a criminal prosecution, no reason occurs why those who merely are possible employers should be required to respond in damages for conduct to protect their business interests from the result of such [fol. 145] inferences being drawn by their customers.

The authors of section 765 themselves state in their discussion of section 762 the necessity that each business enterprise must be free to select its own relations in its own interests, a part of the liberty of every person to acquire property, engage in business and select which business transactions he shall enter. Section 765 they propose as an exception to the rule of non-liability, as a limitation upon the foregoing freedom, in so far as the concert of refusal affects the economic welfare.

The economic welfare does not require enjoining possible employers from agreeing among themselves that they will not employ persons who refuse to answer questions as to their activities, affiliations and associations in the course of investigations relative to communistic activities in this country. Nor was the privilege against self-incrimination originated or continued for the protection of the economic interests of those who exercise it. No witness may refuse to answer a question because it will affect his economic interests adversely. The exemption is available only if the answer will tend to show conduct for which the witness may be prosecuted and convicted (cf. Ex parte Cohn, 104 Cal. 524).

Another standard of evaluation in determining whether the agreement alleged to have been made by defendants was not justified under the circumstances is to be found in previous rulings in this court that complaints for the termination of school teachers who similarly refused to answer questions, notwithstanding school district rules requiring answers and authorizing termination proceedings

for refusals, stated facts sufficient to constitute causes of action.

Further, it should be noted that section 1028.1 of the Government Code makes it the duty of every public employee to appear before any committee or sub-committee of the Congress or state legislature in this field and answer [fol. 146] questions. The section further provides: "Any public employee who fails or refuses to appear or to answer under oath on any ground whatsoever any questions so propounded . . . shall be suspended and dismissed from his employment in the manner provided by law." The section appears to be a valid legislative enactment.*

Plaintiffs are not concerned with possible employment in the public service, but it would be an anomalous result if public employees were discharged for certain conduct and those not in public service could enjoin or recover damages from non-employers because the latter mutually agreed to refrain from employing persons who so acted. It would be strange law which found service of the public interest in the former instance, but an anathema in the latter merely because of the concert of action.

The foregoing considerations point toward a ruling that, as a matter of law, the agreement alleged was justified under the circumstances, but it is not necessary to go that far. It is necessary, as stated at the outset, that plaintiffs plead facts sufficient to show that the concert of agreement was not justified under the circumstances.

Plaintiffs have recognized that necessity for in the complaint and amended complaint they have alleged purposes behind the said agreement. Paragraph seven of the amended complaint contains those allegations. The purposes alleged were to limit, control and direct plaintiffs' political activities, to coerce and influence them to refrain from adopting or following any course or line of political action or activity not acceptable to the committee on un-American activities, to limit employment of persons to those whose

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*Since the preparation of the foregoing opinion, it has been reported that the District Court of Appeal, Third District, has upheld the constitutionality of section 1028.1, Government Code, (Steinmetz v. ————) but the opinion, if written, is not at hand.

political beliefs are acceptable to said committee and the content of motion pictures to that which is acceptable to said committee. These allegations appear more inciting than substantial, more of a cliché than factual, and while considerable liberality should be allowed the pleader in [fol. 147] stating facts by way of lack of justification "under the circumstances", it does not follow that any statement will suffice because it has been made. If the goal alleged cannot result, the allegation of purpose will not suffice.

The amended complaint alleged that defendants agreed to exclude from employment: (1) communists, (2) those who refused to appear and (3) those who declined to answer questions as to their activities, affiliations, associations and beliefs. These plaintiffs have not alleged that they are communists, they have alleged they appeared, hence the only allegations as to the agreement affecting them is the failure to answer. Merely giving answers as to activities, affiliations, associations or beliefs, past or then current, would not have limited, controlled or directed their political activities. Whatever their past conduct or beliefs, these could not be changed, limited, controlled or directed retroactively. Whatever their then current activities, associations or affiliations these could not then have been changed or directed by anyone except plaintiffs. Their activities could have been controlled and limited only if criminal and the law actually seeks to control and limit criminal activity, political or non-political. The allegations as to beliefs and influencing may be dropped from consideration. The holding of a belief cannot be externally controlled, directed or limited and could not in itself constitute a crime. Belief held, without overt acts, might be immaterial in an inquiry but it would not be within the privilege against self-incrimination. As to influencing plaintiffs' political activities, affiliations and associations the law does not look askance at such efforts and the concerted actions of political parties, clubs and candidates are devoted to that end.

How employment in the industry would be limited to those acceptable to the committee if plaintiffs had answered does not appear. To the attainment of that result we should

have to presume further terms into the agreement alleged and read into the amended complaint facts which have not been alleged.

[fol. 148] The alleged purpose of limiting the content of motion pictures to matter acceptable to the committee cannot stand up under scrutiny. The amended complaint alleges these defendants controlled the industry, presumably plaintiffs did not, therefore the content of pictures would appear to have been determined by defendants prior, during and subsequent to the committee hearings and could not have been affected if plaintiffs had answered. Further, motion pictures are a product of private industry and the law is not concerned with whether the producers thereof desire to exclude content which is not acceptable to some race, creed or committee.

The amended complaint, as did the original, fails to allege unjustness under the circumstances.

When we turn to the second group of plaintiffs (counts 16, 19, 20, 21 and 22) we find certain additional allegations and the absence of one. The added allegations are that the particular plaintiff in each count had been named as a communist by previous witnesses before the committee and had refused to appear before the committee. The allegation missing is that the plaintiff had been subpoenaed to appear. In other words, each of the eighteen counts on behalf of plaintiffs who appeared alleges that the particular plaintiff was subpoenaed although the appearance renders the allegation surplusage, but these five counts are silent as to subpoenas. It is not unreasonable to assume that any absence of or defects in subpoenas would have been alleged in the amended complaint, if not the original. If plaintiffs had not been subpoenaed, they could not state causes of action founded on the agreement, for it, as alleged, applies only to persons who appear or are subpoenaed and fail to appear.

The refusal or failure to appear is not an exercise of the privilege against self-incrimination, for that exemption has never given the witness the right to elect between [fol. 149] appearance or non-appearance. The conduct of these defendants was not authorized by the fifth amendment to the Constitution or the laws of California.

The rule proposed in section 765 of the restatement rests upon an assumed economic value, namely, that while individuals may refuse to have business relations there may be instances in which a concert of refusal will not be tolerated because of the greater force and economic power of the concert of action. Mere concert of action is not condemned, because the law recognizes and upholds concerted effort in collective bargaining and other relationships.

No reason appears why refusals to appear before courts or legislative committees should be encouraged. No reason appears why the economic welfare requires that notwithstanding contemptuous conduct toward a summons from a governmental agency the concert of action of exclusion is a thing which must be enjoined or penalized by an award of damages. The prospect of contempt proceedings, not an award of damages or an injunction must remain the wages of such conduct.

As to each of these five plaintiffs the amended complaint alleges: "plaintiff . . . was named as a Communist by a witness appearing before the said Committee on Un-American Activities. . : . " The defendants herein and the public would be entitled to draw from the refusal to deny or explain this evidence, inferences which were unfavorable. It would be unrealistic to say that the defendant employers who are dependent upon the public for the continuance of their businesses would not be "justified under the circumstances" in making an agreement not to employ this group of plaintiffs. Their economic interest is self-evident and not to be gainsaid by academic discussions.

This brings us to the second group of defendants, three in number, two of whom are members of the congressional committee and one an investigator for the committee.

[fol. 150] Because the amended complaint is merely forty-one mimeographed pages found in the original with certain words pencilled out and three partially new pages, it actually alleges that these defendants entered into an agreement not to employ plaintiffs, allegations which plaintiffs probably did not intend. It is more probable that plaintiffs desire to stand on the allegations that these defendants induced the others to make the agreement.

No demurrer for failure to separately state causes of action was filed by these defendants only a general demurrer to the entire amended complaint.

The court must take cognizance of the probability of an absence of any economic interest in these defendants and consider the allegations to be of a purposeful interference by strangers with the possibility of business relationships.

Purposely causing another not to enter into business relationships with a third person has been recognized as a possible tort from very early times and in many varied situations. Such a tort was recognized as early as the year 1410 and the common law developed a special writ in the field before the end of that century.

The earliest decisions were in cases which involved some violence, threat thereof, fraud or defamation, but the general doctrine has been broadened time and again to situations which do not contain these elements. Within the general field are trademark and trade name infringements, fraudulent misrepresentations, defamation of business and disparagement of goods.

Essential elements are the nature of the acts which constitute the inducement, for not every inducement rest upon tortious conduct; knowledge upon the part of the actor, for an inducement may be without knowledge and not tortious and the relationship of the parties, because that may authorize the conduct of the defendant. In other [fol. 151] words, merely alleging that the defendants "induced" others not to enter into business relationships with the plaintiffs does not allege (1) tortious conduct, or (2) any act on the part of the defendants charged. Such allegation is a legal conclusion of the pleader. It gives the result of action, but fails to allege what was done. It is as descriptive of acts for which no liability attaches as it is of tortious conduct. The facts from which the pleader concludes that the defendant induced the refusal to enter into business relations may or may not warrant the recovery of damages. It may have been completed leaving nothing to enjoin or it may be continuing. The situation cannot be determined either way as a matter of law and plaintiffs should be given another opportunity to amend.

The twenty-three general demurrers (one to each count of the amended complaint) of each of the following defendants, Loew's Incorporated, Paramount Pictures, Inc., Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc., Warner Brothers Pictures, Inc., Republic Productions, Inc., Hal E. Roach Studios, Inc., T.C.F. Film Corporation, Universal Pictures Company, Inc., Warner Bros. Pictures Distributing Corporation, United States Pictures, Inc., Sol Lesser Productions, Inc., Association of Motion Picture Producers, Inc., E. B. Mannix, Dore Schary, Harry M. Warner and Jack Warner are sustained without leave to amend.

The general demurrers of the defendants Donald L. Jackson, Clyde Doyle and William Wheeler to the amended complaint are sustained with thirty days to amend.

Dated: July 9, 1954.

Ellsworth Meyer, Judge.

[fol. 152] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 610835

MICHAEL WILSON, *et al.*, Plaintiffs,

v.

LOEW'S INCORPORATED, a corporation, et al., Defendants.

JUDGMENT OF DISMISSAL AS TO CERTAIN DEFENDANTS—August 2, 1954

This matter came on regularly to be heard in Department 25 of the above-entitled court on December 29, 1953, upon the demurrers to the amended complaint of defendants Loew's Incorporated, Paramount Pictures, Inc., Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc., Warner Brothers Pictures, Inc., Republic Productions, Inc., Hal E.

Roach Studios, Inc., T. C. F. Film Corporation (sued herein as Twentieth Century-Fox Film, Inc.), Universal Pictures Company, Inc. (sued herein as Universal Pictures Company), Warner Bros. Pictures Distributing Corp., United States Pictures, Inc., Sol Lesser Productions, Inc., Association of Motion Picture Producers, Inc. (sued herein as 1 Doe Co.), E. B. Mannix, Dore Schary, Harry M. Warner and Jack Warner. Each of the plaintiffs and each of said demurring defendants duly and regularly appeared [fol. 153] by their respective attorneys of record and argued said cause. The Court having taken said matter under submission and having duly considered the same and having made its order herein sustaining said demurrers and each of them without leave to the plaintiffs or any of them to amend, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the within cause be and it hereby is dismissed as to said demurring defendants and each of them and that said defendants and each of them have their costs incurred herein, which said costs are hereby taxed at the sum of $41.00.

Dated: August 2, 1954.

Ellsworth Meyer, Judge.

[fol. 154] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

NOTICE OF APPEAL—Filed September 7, 1954

To the Defendants, Association of Motion Picture Producers, Inc. (sued herein as 1 Doe Co.) and to Irving M. Walker and Herman F. Selvin, their attorneys; Loew's Incorporated, Republic Productions, Inc., E. B. Mannix and Dore Schary, and to Loeb and Loeb, their attorneys; Paramount Pictures, Inc., and to O'Melveny & Myers, its attorneys; Columbia Pictures Corporation, RKO Radio Pictures,

Inc., Sol Lesser Productions, Inc. and Hal E. Roach Studios, Inc., and to Mitchell, Silberberg & Knupp, their attorneys; Warner Brothers Pictures, Inc., Warner Bros. Pictures Distributing Corp., Harry M. Warner and Jack Warner and to Freston & Files, their attorneys; T.C.F. Film Corporation (sued herein as Twentieth Century-Fox Film, Inc.) and to Wright, Peeler & Garrett, its attorneys; Universal Pictures Company, Inc. (sued herein as Universal Pictures Company) and to Joseph S. Dubin, its attorneys, United States Pictures, Inc., and to Oliver B. Schwab, its attor-[fol. 155] neys, Honorable Ellsworth Meyer, Judge of the above entitled Court and to the Clerk of the above entitled Court, to the District Court of Appeal of the State of California, Second Appellate District and to the Clerk of said Court:

PLEASE TAKE NOTICE that the plaintiffs herein hereby appeal to the District Court of Appeal of the State of California, Second Appellate District, from the judgment and the whole thereof entered August 5, 1954, in the office of the County Clerk of the County of Los Angeles in Book 2764 of Judgments, page 168, of the records of the above entitled Court.

Dated: September 7, 1954.

Kenny and Morris, Margolis, McTernan and Branton, Thomas E. Newsom, William B. Esterman, By Robert W. Kenny, Attorneys for Plaintiffs and Appellants.

[fol. 156] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

REQUEST FOR CLERK'S TRANSCRIPT PURSUANT TO RULE 5, RULES ON APPEAL—Filed September 7, 1954

To the Clerk of the Above Entitled Court:

Please prepare a Clerk's Transcript for appeal from the judgment heretofore rendered in the above entitled action

and entered on August 6, 1954, which transcript shall include the following:

1. First Amended Complaint.

2. Demurrer of the defendants Loew's Incorporated, Paramount Pictures, Inc., Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc., Warner Brothers Pictures, Inc., Republic Productions, Inc., Hal E. Roach Studios, Inc., T.C.F. Film Corporation (sued herein as Twentieth Century-Fox Film, Inc.) Universal Pictures Company, Inc. (sued herein as Universal Pictures Company), Warner Bros. Pictures Distributing Corp., United States Pictures, Inc., Sol Lesser Productions, Inc., Association of Motion [fol. 157] Picture Producers, Inc. (sued herein as 1 Doe Co.), E. B. Mannix, Dore Schary, Harry M. Warner and Jack Warner, to first amended complaint.

3. Memorandum ruling of the Court dated July 15, 1954.

4. Judgment of dismissal as to the above named defendants entered August 5, 1954, at Book 2764 of Judgments, p. 168.

5. Notice of Appeal from said Judgment of August 5, 1954.

6. This request for Clerk's Transcript.

Dated: September 7, 1954.

Kenny and Morris, Margolis, McTernan & Branton, Thomas E. Neusom, William B. Esterman, By Robert W. Kenny, Attorneys for Plaintiffs and Appellants.

[fol. 158] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

RESPONDENTS' DESIGNATION OF MATTERS TO BE INCLUDED IN CLERK'S TRANSCRIPT PURSUANT TO RULE 5(b) RULES ON APPEAL—Filed September 17, 1954

To the Clerk of the Above-Entitled Court:

Please include in the Clerk's Transcript heretofore requested to be prepared by the appellants herein, the following papers:

1. The original complaint filed herein (an original and carbon copy of which are furnished you herewith).

2. Minute order of the court dated October 5, 1953, sustaining demurrers to the original complaint on file herein.

3. This request.

[fol. 159] Dated: September 9, 1954.

Irving M. Walker, Herman F. Selvin, By Herman F. Selvin, Attorneys for respondents Association of Motion Picture Producers, Inc. (sued herein as 1 Doe Co.); Loew's Incorporated, Republic Productions, Inc., E. B. Mannix, Dore Schary, Columbia Pictures Corporation, RKO Radio Pictures, Inc., Sol Lesser Productions, Inc., Hal E. Roach Studios, Inc., Warner Brothers Pictures, Inc., Warner Bros. Pictures Distributing Corp., Harry M. Warner, Jack Warner, T.C.F. Film Corporation (sued herein as Twentieth Century-Fox Film, Inc.), Universal Pictures Company, Inc. (sued herein as Universal Pictures Company), United States Pictures, Inc. and Paramount Pictures, Inc.

[fol. 160] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT
(Omitted in printing)

[fol. 161] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

DEMURRER OF DEFENDANTS CLYDE DOYLE AND DONALD L. JACKSON TO FIRST AMENDED COMPLAINT—Filed December 15, 1953

Come now defendants Clyde Doyle and Donald L. Jackson, appearing for themselves alone, and demur to the first amended complaint herein on the ground:

That the first amended complaint does not, nor does any of the causes of action therein, state facts sufficient to constitute a cause of action against these defendants or either of them.

WHEREFORE, these defendants pray that plaintiffs take nothing by their action and that they be dismissed hence with their costs.

Dated: December 14, 1953.

Guy Richards Crump, Slate & Sawtelle, By Guy Richards Crump, Attorneys for defendants Clyde Doyle and Donald L. Jackson.

This Demurrer will be filed December 15, 1953, for hear-
[fol. 162] ing with Demurrers and Motions of other defendants on December 22, 1953.

(Points and Authorities on file but omitted herefrom.)

[File endorsement omitted]

[fol. 163] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

DEMURRER OF DEFENDANT WILLIAM WHEELER TO FIRST AMENDED COMPLAINT—Filed December 15, 1953

Comes now defendant William Wheeler, appearing for himself alone, and demurs to the first amended complaint herein on the ground:

That the first amended complaint does not, nor any of the causes of action therein, state facts sufficient to constitute a cause of action against this defendant.

WHEREFORE, this defendant prays that plaintiffs take nothing by their action and that he be dismissed hence with his costs.

Dated: December 14, 1953.

Guy Richards Crump, Slate & Sawtelle, By Guy Richards Crump, Attorneys for defendant William Wheeler.

This Demurrer will be filed December 15, 1953, for hearing with Demurrers and Motions of other defendants on December 22, 1953.

(Points and Authorities on file, but omitted herefrom.)

[fol. 164] [File endorsement omitted]

[fol. 164a] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 610835

MICHAEL WILSON, *et al.*, Plaintiffs,

v.

LOEW'S INCORPORATED, *et al.*, Defendants.

JUDGMENT FOR DEFENDANTS CLYDE DOYLE, DONALD L. JACKSON AND WILLIAM WHEELER AFTER ORDER SUSTAINING DEMURRERS AND FAILURE OF PLAINTIFFS TO AMEND—September 14, 1954

In this action defendants Clyde Doyle, Donald L. Jackson and William Wheeler, by their attorneys Guy Richards Crump and Slate & Sawtelle having appeared and demurred to plaintiffs' amended complaint herein, within the time allowed by the Court, and the issue of law raised by said demurrers having been argued and submitted to the Court, and the Court, being fully advised in the premises, having on the 9th day of July, 1954, sustained said demurrers and granted plaintiffs 30 days from July 9, 1954, within which

to file a second amended complaint and no second amended complaint having been filed, and said defendants through their said attorneys having moved this Court for judgment of dismissal pursuant to Section 581-3 of the Code of Civil Procedure and proof of due notice of said motion having been made and there being no objections thereto and the matter coming on regularly for hearing this 14th day of September, 1954, pursuant to said notice of motion;

[fol. 164b] NOW, THEREFORE, IT IS ADJUDGED that this action be and the same is hereby dismissed as to said defendants Clyde Doyle, Donald L. Jackson and William Wheeler.

Dated: September 14, 1954.

Ellsworth Meyer, Judge.

[fol. 165] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 610835

[Title omitted]

NOTICE OF APPEAL—Filed November 5, 1954

To the Defendants, Clyde Doyle, Donald L. Jackson and William Wheeler, and to Guy Richards Crump, Slate and Sawtelle, their attorneys and to Honorable Ellsworth Meyer, Judge of the above entitled Court and to the Clerk of the above entitled Court, to the District Court of Appeal of the State of California, Second Appellate District and to the Clerk of said Court:

PLEASE TAKE NOTICE that the plaintiffs herein hereby appeal to the District Court of Appeal of the State of California, Second Appellate District, from the judgment and the whole thereof dated September 14, 1954, and entered September 16, 1954, in the Special Minute Order Book of the above entitled Court.

Dated: November 5, 1954.

Kenny and Morris, Margolis, McTernan and Branton, Thomas E. Neusom, William B. Esterman, By Robert W. Kenny, Attorneys for Plaintiffs and Appellants.

[fol. 166] [File endorsement omitted]

[fol. 247] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

Civil Nos. 20769, 21100

MICHAEL WILSON, *et al.*, Appellants,

v.

LOEW'S INCORPORATED, a corporation *et al.*, Defendants; ASSOCIATION OF MOTION PICTURE PRODUCERS, INC., *et al.*, Respondents.

OPINION—Filed June 11, 1956

Appeals from judgments of the Superior Court of Los Angeles County. Ellsworth Meyer, Judge. Affirmed.

Kenny & Morris, Thomas G. Neuson, Margolis, McTernan & Branton and Robert W. Kenny for Appellants.

Irving M. Walker, Herman F. Selvin, Loeb & Loeb, O'Melveny & Myers, Mitchell, Silberberg & Knupp, Freston & Files, Wright, Peeler & Garrett, Joseph S. Dubin and Oliver B. Schwab for Respondents in Civ. No. 20769.

Guy Richards Crump and Slate & Sawtelle for Respondents in Civ. No. 21100.

[fol. 248] Appeals from two judgments of dismissal. The case is here on an amended complaint, referred to as the complaint. There are 23 plaintiffs and 23 counts. All of the defendants except three are motion picture producers and distributors. Two of the three remaining defendants are members of the Committee on Un-American Activities of the United States House of Representatives and the third is an investigator for that Committee. A demurrer of the motion picture producers and distributors was sustained without leave to amend and judgment of dismissal entered. One of the appeals is from that judgment. Demurrers of the three remaining defendants to the amended complaint were sustained with leave to amend. Plaintiffs declined to amend

and judgment of dismissal followed. The other appeal is from that judgment.

Each count of the complaint relates to only one plaintiff. The counts are identical except for personal data. A statement of the first count will suffice as a statement of the pleading as a whole. It alleges:

1. Plaintiff Wilson is by profession a motion picture writer; has had more than 5 years experience as a writer; has acquired a reputation for work in the motion picture industry; has won high esteem as a writer in that industry; [fol. 249] all of which defendants at all times knew.[1]

2. The corporate defendants are engaged in the production and distribution of motion pictures. The corporate and individual defendants, other than the Committee members and the investigator, control directly and indirectly all motion picture production and distribution in the United States and all motion picture employment opportunities for actors, writers, directors, producers and other employees in that industry.

3. Defendant members of the Committee on Un-American Activities and the investigator at all times and with respect to the matters alleged "acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities."

4. Prior to March 1951 and continuously thereafter defendants, and each of them, agreed with each other to refuse employment to, and exclude from employment in the motion picture industry the following persons:

a. All employees and persons seeking employment who [fol. 250] had been or thereafter were subpoenaed as witnesses before the Committee on Un-American Activities of the House of Representatives and who refused on constitutional grounds to answer questions "concerning their political affiliations, associations and beliefs."

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[1] The allegations with respect to the other plaintiffs are identical except that those who are not writers are alleged to be actors, actresses, a story editor, a research worker, and a grip, respectively, with experience ranging from "more than 5" to "more than 25" years.

b. All employees in the industry and persons seeking employment therein who were named before the Committee as Communists or who were subpoenaed to appear as witnesses before the Committee, or who were suspected of ever having been Communists or of ever having had associations with Communists, and who refused or failed to appear before the Committee and waive and surrender their constitutional rights and testify or give statements fully disclosing "their own political affiliations, association and beliefs and those of their family, friends, associates and acquaintances."

c. Defendants, with the intent to prevent such employees and other persons from having or obtaining employment in the motion picture industry, maliciously and without justification undertook to and did induce and persuade each other and other employers in the industry to desist and refrain from employing and to refuse employment to all such employees and other persons.

[fol. 251] d. All defendants, as a part of the agreement and as one of the means of effectuating it, have published and circulated throughout the entire motion picture production and exhibition fields a list containing the names of such employees and other persons with the direction and intent that they be not employed. Plaintiff contends defendants wrongfully, maliciously, and without justification or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the industry and to pursue their professions and occupations therein, and have prevented their employment therein.

5. On September 20, 1951 plaintiff Wilson appeared before the Committee pursuant to subpoena. He there refused to answer certain questions "concerning his political affiliations, beliefs and associations" basing his refusal on his constitutional rights, including the privilege against self-incrimination.

6. As a result of such refusal and by reason of the acts of and pursuant to the agreement of defendants, Wilson ever since September 20, 1951 has been and he now is refused and is excluded from employment in the industry. Therefore he will henceforth continue to find it impossible

[fol. 252] to obtain employment in the profession to which he has devoted a major part of his life and energy.

7. It is plaintiff's belief that the purpose of the agreement is to limit, control, and direct the political activities of defendants' employees; to coerce and influence them through and by means of threat of discharg- and loss of employment from adopting or following any course or line of political action and activity not acceptable to the Committee; to limit employment in the industry to those persons whose political beliefs are acceptable to the Committee; and to limit the production of motion pictures by the industry to those the content of which is acceptable to the Committee.

8. Plaintiff has been damaged in the sum of $1,000,000 for loss of opportunity of employment in the industry and deprivation of artistic and intellectual gratification flowing therefrom and the resulting humiliation and anguish; in the sum of $250,000 for the jeopardizing of employment opportunities in other industries because of the necessity of disclosing the reasons for his inability to obtain employment in the industry; and in the sum of $1,000,000 as punitive damages.

The allegations in respect to the appearance of all but five of the plaintiffs before the Committee are, save for [fol. 253] dates, identical. In each instance the appearance before the Committee was after the alleged making of the agreement. As to the five who did not appear, the averments are that each was named as a Communist by a witness appearing before the Committee; that each refused to appear before the Committee to answer questions concerning his or her "political affiliations, beliefs and associations," basing such refusal on his or her constitutional rights including the privilege against self-incrimination; as a result of the acts of and pursuant to the agreement, they have been refused and excluded from employment in the industry by defendants and all other employers therein; and they will henceforth find it impossible to obtain such employment. In each instance the refusal to appear was after the making of the alleged agreement.

The prayer is for money damages of $2,250,000 on each count and for an injunction.

The amended complaint is to be implemented by the facts of which we take judicial notice. In considering a demurrer to a complaint, facts judicially noticed are deemed a part of the complaint even when the pleading contains an express allegation to the contrary.[2] We take judicial notice of the proceedings and reports of the Committee on Un-American [fol. 254] Activities.[3] The proceedings and reports of the Committee show that each of 18 of the 23 plaintiffs was asked by the Committee whether he or she was then or ever had been a member of the Communist Party. Each refused to answer, asserting his or her constitutional privilege against self-incrimination. Each of the other 5 plaintiffs was stated to be a Communist by a witness before the Committee and on the same grounds refused to appear and state whether he was then or ever had been a member of [fol. 255] the Communist Party. The refusals occurred in the course of hearings held as part of a Congressional investigation by the Committee on Un-American Activities of the House of Representatives acting within the scope of its authority into Communist infiltration of the motion picture industry,[4] for the protection of the internal security

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[2] *Chavez* v. *Times-Mirror Co.*, 185 Cal. 20, 23; *Loranger* v. *Nadeau*, 215 Cal. 362, 365; *Hammell* v. *Britton*, 19 Cal. 2d 72, 75; *Weil* v. *Barthel*, 45 Cal. 2d 835, 837.

[3] Code Civ. Proc., sec. 1875(3); *Arizona* v. *California*, 283 U.S. 425, 75 L.Ed. 1154, 51 S.Ct. 522 Footnote 4; *Greeson* v. *Imperial Irr. Dist.*, 9 Cir., 59 F. 2d 529, 531; *Louisville Gas & Electric Co.* v. *Federal Power Com'n.*, 6 Cir., 129 F. 2d 126, 134, cert. den. 318 U.S. 761, 87 L.Ed. 1133, 63 S.Ct. 559; *Overfield* v. *Pennroad Corporation*, 3 Cir., 146 F. 2d 889, 898; *Stasiukevich* v. *Nicolls*, 1 Cir., 168 F. 2d 474, 479; *Osage Nation of Indians* v. *United States*, 97 F. Supp. 381, 403, cert. den. 342 U.S. 896, 96 L.Ed. 672, 72 S.Ct. 320; *Rank* v. *Krug*, 90 F. Supp. 773, 781; *United States* v. *Aluminum Co. of America*, 1 F.R.D. 71; *Mullan* v. *State*, 114 Cal. 578, 582; *Davis* v. *Whidden*, 117 Cal. 618, 623; *French* v. *Senate of State of California*, 146 Cal. 604, 608; *Pacific Employers Ins. Co.* v. *Carpenter*, 10 Cal. App. 2d 592, 602. Cf. *Parker* v. *James Granger, Inc.*, 4 Cal. 2d 668, 677, cert. den. 298 U.S. 644, 80 L.Ed. 1375, 56 S. Ct. 943; *Arnold* v. *Universal Oil Land Co.*, 45 Cal. App. 2d 522, 529; *El Zarape etc. Factory* v. *Plant Food Corp.*, 90 Cal. App. 2d 336, 346.

[4] Act of August 2, 1946, c. 753, Title I, Pt. 2, sec. 121 (q), 60 Stat. 828; Senate Doc. No. 26, 80th Congress, 1st Session; *Dennis* v. *United States*, App. D.C., 171 F. 2d 986, 987-8, aff. 339 U.S.

of this Nation and the public disclosure of the forces that menace the United States. It thus appears, contrary to the allegations of the complaint, that the questions which the 18 plaintiffs refused to answer and that the statements which the 5 refused to appear and give had nothing whatever to do with their political affiliations, associations, or beliefs but concerned their membership in a "conspiratorial and revolutionary junta"[5] one of whose objectives is the overthrow of our government by force and violence,[6] a

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162, 94 L.Ed. 734, 70 S.Ct. 519; *Lawson* v. *United States*, App. D.C., 176 F. 2d 49, 51-2, cert. den. 339 U.S. 934, 94 L.Ed. 1352, 70 S.Ct. 663; *Barsky* v. *United States*, App. D.C., 167 F. 2d 241, 250, cert. den. 334 U.S. 843, 92 L.Ed. 1767, 68 S.Ct. 1511.

[5] Concurring opinion of Mr. Justice Jackson, *American Communications Assoc.* v. *Douds*, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 764.

[6] *Menace of Communism*, Senate Doc. No. 26, 80th Congress, 1st Session; *Report on the Communist Party of the United States as an Advocate of Overthrow of Government by Force and Violence*, House Report No. 1920, 80th Congress, 2d Session; House Doc. No. 251, 83d Congress, 2d Session, 100 Congressional Record 80; *Communism in Action*, House Doc. No. 754, 79th Congress, 2d Session; Labor Management Relations Act, 1947, Sec. 1 et seq., 29 U.S.C.A. Supp. sec. 159(h), *American Communications Asso.* v. *Douds*, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 764; Internal Security Act of 1950, sec. 1 et seq., 50 U.S.C.A. sec. 781 et seq.; Communist Control Act of 1954, Sec. 1 et seq., 50 U.S.C.A. Supp. sec. 841 et seq.; Government Code, sec. 1027.5; *National L.R. Bd.* v. *Highland Park Mfg. Co.*, 341 U.S. 322, 95 L.Ed. 969, 71 S.Ct. 758; concurring opinion of Mr. Justice Jackson in *Dennis* v. *United States*, 341 U.S. 494, 564-595, L.Ed. 1137, 1181, 71 S.Ct. 857; *Galvan* v. *Press*, 347 U.S. 522, 529, 98 L.Ed. 911, 74 S.Ct. 737; *Rosenberg* v. *United States*, 2 Cir., 195 F. 2d 583, cert. den. 344 U.S. 838, 97 L.Ed. 652, 73 S.Ct. 20; *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, aff. 334 U.S. 854, 92 L.Ed. 1776, 68 S.Ct. 1529; *Lawson* v. *United States*, App. D.C., 176 F. 2d 49, cert. den. 339 U.S. 934, 94 L.Ed. 1352, 70 S.Ct. 663; *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 212-3, aff. 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857; *Barsky* v. *United States*, App. D.C., 167 F. 2d 241, 247, cert. den. 334 U.S. 843, 92 L.Ed. 1767, 68 S.Ct. 1511; *Daniman* v. *Board of Education*, 306 N.Y. 532, 540-1, 119 N.E. 2d 373, 379; *People* v. *Chambers*, 22 Cal. App. 2d 687, 709-13; 37 Georgetown L.J. 297. Said Judge Learned Hand in *United States* v. *Dennis*, *supra*, (183 F. 2d 212): "The American Communist Party, of which the defendants are the controlling spirits, is a highly articulated, well contrived, far spread organization, numbering

[fol. 257] malignant force which menaces the very existence of the government. It also necessarily appears, contrary to allegations of the complaint, that the purpose of the agreement was not to limit, or control, or direct the political activities of defendants' employees or to coerce them from following any course of political action or to limit employment in the industry to those persons whose political beliefs are acceptable to the Committee. Nor was the investigation into the political beliefs of anyone. The allegations of the complaint in these respects are misleading and evasive. The word "political" implies "orderly conduct of government, not revolution." (*Lockheed Aircraft Corp.* v. *Superior Court*, 28 Cal. 2d 481, 485.)

The Case Against the Motion Picture Producers and Distributors

The complaint sounds in tort. To state a cause of action facts must be alleged showing that some legally protected interest of plaintiffs has been injured. (*MacLeod* v. *Fox West Coast T. Corp.*, 10 Cal. 2d 383, 386; *Stryker* v. *Republic Pictures Corp.*, 108 Cal. App. 2d 191, 195.) The com- [fol. 258] plaint does not allege any present or existing contract or employment of any *of any* one of plaintiffs. The cause of action attempted to be alleged is obviously one for wrongful interference with future or prospective contract or business relations. In effect it is alleged the motion picture producers and distributors combined and agreed to make it a condition of employment in the motion picture industry that the person shall not have been subpoenaed as a witness before the Committee and have refused

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thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, it- sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. That article, which is a common-place among initiates, is a part of the homiletics for novitiates, although, so far as conveniently it can be, it is covered by an innocent terminology, designed to prevent its disclosure. Our democracy, like any other, must meet that faith and that creed on the merits, or it will perish; and we must not flinch at the challenge."

on constitutional grounds to answer, not questions concerning his political affiliations, activities, or beliefs, but whether he is or ever has been a member of the Communist Party, or that the person was named before the Committee as a Communist and had refused on constitutional grounds to appear before the Committee to answer questions concerning his Communist affiliations, beliefs, and associations. The specific injury of which plaintiffs complain is the loss or prevention of future or prospective employment in the motion picture industry. To state facts sufficient to constitute a cause of action for such loss or prevention of employment, it must be averred that at the time of the alleged tort there was a certain or definite prospect that plaintiffs would obtain it.

[fol. 259] The general rule is that before recovery can be had for interference with the loss of a future or prospective contract or business relationship, it must appear that such contract or relationship would otherwise have been entered into. (Cases collected 9 A.L.R. 2d 228, 256-7.) In *Campbell* v. *Rayburn*, 129 Cal. App. 2d 232, the complaint alleged: the plaintiff wrote a letter to the attorney general describing gambling activities in Riverside County; the attorney general advised the plaintiff that the letter had been forwarded to the defendant sheriff of Riverside County for attention and appropriate action; the defendant sheriff induced or otherwise caused two named gamblers who owned property in Palm Springs not to rent the plaintiff office space for the purpose of carrying on his business as a real estate broker; one of the named gamblers told the plaintiff he would not "give the plaintiff standing room"; and this same gambler had influenced his friends not to rent office space to the plaintiff, thus forcing him to conduct his business from his home. Demurrer was sustained without leave. Saying there was an attempt to state a cause of action for alleged wrongful interference with prospective contractual relations, the court on review held (p. 234):

> [fol. 260] "[N]o facts are alleged with respect to whether such accommodations would otherwise have been available on terms satisfactory to the plaintiff, the availability or lack of accommodations other than those referred to, or facts showing that the plaintiff

had any reasonable expectation of economic advantage which would otherwise have accrued to him, and no facts are alleged tending to show the nature or amount of any damage to the plaintiff.

"The general principles applicable here have been applied in decisions in other states."

The court then quoted with approval from *Goldman* v. *Feinberg*, 130 Conn. 671, 37 A. 2d 355, *Union Car Advertising Co.* v. *Collier*, 263 N.Y. 386, 189 N.E. 463, and *Debnam* v. *Simonson*, 124 Md. 354, 92 A. 782. The judgment was affirmed.

In *Goldman* v. *Feinberg*, 130 Conn. 671, 37 A. 2d 355, quoted from in the Campbell case, one of the defendants requested the plaintiff, a real estate broker, to show him some houses which were for sale. The plaintiff did so over a period of 7 months but to no avail. Among the [fol. 261] homes was one which the plaintiff saw on a public listing issued by a bank, the list price for which was stated to be the irreducible minimum. At the defendant's request the plaintiff inquired of the bank if the price could be lowered and was told it could not. He did not inform the bank he was negotiating with the defendant. Later the bank sold the house to the defendant and paid the latter's father (also a defendant) a commission. The father had been present when the plaintiff showed the house to the son. The plaintiff's theory was that the defendants had conspired fraudulently to represent to the bank that the father was the procuring broker, thus depriving the plaintiff of a commission he would otherwise have been able to earn. The question as stated by the court was "whether the plaintiff, in order to make out a cause of action, must prove that he would have made a profit except for the unlawful interference with business relations is recognized not only in respect to existing contracts but also as to one's right to pursue his lawful occupation or business and concluded (37 A. 2d 356):

"It does not follow from this, however, that a plaintiff [fol. 262] may recover for an interference with a mere possibility of his making a profit. On the Contrary,

wherever such a cause of action as this is recognized, it is held that the tort is not complete unless there has been actual damage suffered. Pollock, Torts, 14th Ed., p. 441; Winfield, Law of Tort-, 2d Ed., p. 643; Prosser, Torts, p. 1016 et seq. To put the same thing in another way, it is essential to a cause of action for unlawful interference with business that it appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit. [Citations.] In Lewis v. Bloede, supra, the Circuit Court of Appeals says (202 Fed. at p. 17): 'When the parties have entered into a contract, the terms of which are fixed, the plaintiff is only required to show the malicious interference and the damage proximately [fol. 263] resulting; whereas, if the ground of complaint is that he was about to make a contract, he is required to go further and show that he was not only "about to," but would, but for the malicious interference of the defendants, have entered into the contract.'"

In *Union Car Advertising Co.* v. *Collier,* 263 N.Y. 386, 189 N.E. 463, also quoted from in the Campbell case, the plaintiff was one of two bidders on a proposal to lease advertising space in the cars and platforms of an elevated railway. The plaintiff's bid offered the higher rental of the two. The negotiations with the lower bidder and proceeded to a point which made it likely, if not certain, that the plaintiff would get the contract on which it was bidding. The railway company awarded the contract to the defendants after changes in terms, on which the plaintiff had not been given an opportunity to make a proposal. The plaintiff's contention was that the result came about from the defendants' wrongful interference. The interference consisted of misrepresentations as to the plaintiff's business ability and financial integrity; the bringing of political and economic pressure on the railway's trustees; and the de-[fol. 264] fendants' indemnification of the railway from loss resulting from lawsuits arising out of rejection of the plaintiff's bid. The jury was instructed that the plaintiff could recover if the defendants' acts had prevented the

railway company "from entering with him into a contract which it is reasonably certain would have been made but for such interference." The judgment was for the plaintiff. Reversing, the Court of Appeals said (189 N.E. 469):

> "[Referring to the quoted instruction] If these words mean anything less than 'would have received,' we think they go too far. A cause of action exists where an executed contract is broken by a third person's unlawful interference. [Citation.] A cause of action has also been recognized where a party *would* have received a contract but for the malicious, fraudulent, and deceitful acts of a third party, such, for instance, as materially lying about him. [Citations.] There must be some certainty that the plaintiff would have gotten the contract but for the fraud. This cannot [fol. 265] be left to surmise or speculation. The courts rightfully extended the arm of the law to reach one who deliberately interfered with an executed contract [citation], since which time they have gone a step further and mulcted in damages him who does the same thing to one who *would* have received such a contract but for the illegal interference. [Citations.] The courts will be a little slow in permitting juries to speculate upon what a competitor had reason to expect or might reasonably suppose would happen. The expressions 'reasonable expectation' or 'reasonably certain' may not be as precise as '*would* have received,' and we think the latter words are preferable."

In *Debnam* v. *Simonson*, 124 Md. 354, 92 A. 782, also quoted from in the Campbell case and cited with approval in *Imperial Ice Co.* v. *Rossier*, 18 Cal. 2d 33, 36, the plaintiff devised a plan to buy certain land and build an apartment building thereon. He disclosed his project in confidence to one of the defendants who was an architect and [fol. 266] entered into a contract with the latter to prepare the plans and specifications. He also entered into contracts for labor, materials, and financing, and was about to enter into a contract for the land. At that time the defendants, conspiring together, acquired the land for themselves, thus

preventing the plaintiff from consum-ating his proposed purchase and also preventing his performance of the other contracts into which he had entered. A demurrer to the complaint was sustained. The Maryland Court of Appeals held (92 A. 783):

> "The mere fact that the plaintiff has suffered damage or has lost an opportunity to profit financially because of his failure to consummate his plans owing to the purchase of said lot of land by the defendants does not in itself give him the right of recovery from the defendants for the damage *sus*-sustained by him. The act must be of such a character as to create an actionable wrong before the right of recovery against the defendants exists, and, to create an actionable wrong, the legal rights of the plaintiff must in some way be [fol. 267] invaded. There must be a violation of a legal right committed knowingly to create a cause of action. . . .
>
> "[92 A. 784.] [T]his declaration is also defective because it does not allege with sufficient clearness, if at all, that, but for the alleged interference of the defendants, the plaintiff would have become the purchaser of the property, and would have succeeded in consummating his alleged contemplated plans or project. Such an allegation is necessary. Before he can recover it must be shown that, but for that interference, the purchase would have been made and his plans consummated."[7]

The complaint in the case at bar is devoid of any allegation of fact that any contract or relationship would have [fol. 268] been entered into between any one of plaintiffs and any one of defendant motion picture producers and distributors or with anyone in the motion picture industry but for the alleged agreement. There is no factual showing

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[7] And see *Hundley* v. *Louisville & N.R. Co.*, 105 Ky. 162, 48 S.W. 429, 431, 63 L.R.A. 289, 88 A.S.R. 298; *Bailey* v. *Hans Watts Realty Co.*, 113 W. Va. 739, 169 S.E. 404; *Celli & Del Papa* v. *Galveston Brewing Co.*, (Tex.) 227 S.W. 941, 943; *Payne* v. *Gebhard*, (Tex. Civ. App.) 136 S.W. 1118, 1120; *Harnick* v. *Avrum Realty Corp.*, 248 App. Div. 385, 288 N.Y.S. 256.

of denial of employment. There is no allegation that at the time the agreement was made, or at any time thereafter, any one of plaintiffs was an employee of any one of the defendants or had any reasonable prospect of becoming such; or that any one of them was, or is, or had any prospect of being a producer of motion pictures. There is not even an allegation that there were any negotiations pending or in progress between any one of plaintiffs and any one of defendants or with anyone in the industry, or that any plaintiff was seeking employment in the industry at the time of the alleged tortious interference. There is no allegation that at any time after the making of the agreement any one of plaintiffs requested employment from any one of defendants or from anyone in the motion picture industry. It is not alleged that but for defendants' alleged interference any one of plaintiffs would, or even probably or possibly would, have been employed in the industry. At the oral argument counsel for plaintiffs conceded it was not alleged [fol. 269] "that individual plaintiffs did apply for work and were denied the right to work."

So far as appears, the last efforts of plaintiffs to obtain employment may have occurred years before the agreement. All that is alleged is that at some unspecified time prior to the agreement, they had been so employed. When and why that employment was terminated is not alleged. Since the employment terminated some time before the agreement, in the absence of contrary allegation the inference necessarily is that the termination was the result of facts wholly disconnected from the agreement and that those facts, whatever they may have been, still are effective. It cannot be inferred from the alleged fact that at some unspecified time prior to the agreement plaintiffs were employed in the motion picture industry, they have not obtained employment since they invoked their constitutional privilege solely because of that fact.

There is an entire absence of factual allegation showing that any legally protected interest of plaintiffs has been interfered with. Neither an existing nor a prospective contract or business relationship is alleged. And there is nothing in the pleading from which it may be inferred that

any prospective contract or business relationship has been [fol. 270] interfered with by any wrongful act of defendants. The most that is alleged is a hope or expectation of employment. The complaint does not state facts sufficient to constitute a cause of action.

Bigelow v. *RKO Radio Pictures,* 327 U.S. 251, 90 L.Ed. 652, 66 S.Ct. 574, and *Speegle* v. *Board of Fire Underwriters,* 29 Cal. 2d 34, cited by plaintiffs, are not apposite. In Bigelow, a suit for an injunction and damages for violation of the Sherman and Clayton Acts, the sole question was, as stated by the court, "whether the evidence of damage [was] sufficient to support the verdict" for plaintiff. In Speegle the complaint alleged interference with existing contracts.

Plaintiffs argue they should have been permitted to amend. One of the grounds of defendants' demurrer to the original complaint was that no cause of action was stated because of the absence of any allegation to the effect that an existing or prospective contract or business relationship had been interfered with.[8] The demurrer was sus- [fol. 271] tained with leave. Plaintiffs then filed the complaint now before us. Plaintiffs amended only perfunctorily. For all practical purposes the original and the amended complaint are identical. No curative effort at all was exerted though opportunity was given. We must assume that plaintiffs have stated their cases as strongly as it was possible for them to do. (*Faulkner* v. *Cal. Toll Bridge Au-*

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[8] In points and authorities filed in support of their demurrer to the original complaint, defendants said: "The complaint does not state facts sufficient to constitute a cause of action for interference with business relations. No existing contract between plaintiffs and any of the defendants is alleged. Consequently, there must be shown a reasonable probability that, but for the alleged interference, business relations between the parties would have been entered into. It is not enough that plaintiffs hoped or even expected that such relations might eventuate, the fact that they would have eventuated must appear.

"Before recovery can be had for interference with and loss of a prospective business relationship or contract, it is held that it must appear that such relationship or contract would otherwise have been entered into.'

"*Annotation,* 9 A.L.R. 2d 256-257, and cases there cited."

thority, 40 Cal. 2d 317, 328.) Having declined to avail themselves of leave to amend in the particular which defendants specifically pointed out to them, plaintiffs must "stand upon their pleading as against all grounds and if the complaint is objectionable upon any ground the judgment of dismissal must be affirmed. [Citations.] Upon appeal from a judgment rendered after refusal to amend a complaint to which a demurrer has been sustained, it must be presumed that the pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and un- [fol. 272] certainties must be resolved against him." (*Metzenbaum* v. *Metzenbaum,* 86 Cal. App. 2d 750, 752.) Plaintiffs evidenced their satisfaction with the pleading and their willingness to stand or fall on it in its present form. The court did not err in sustaining the demurrer of the motion picture producers and distributors without leave to amend.

In view of our conclusion, we do not reach other points argued by counsel.

THE CASE AGAINST THE MEMBERS OF THE COMMITTEE AND THE INVESTIGATOR

The demurrers of these defendants were sustained with leave to amend. Plaintiffs declined to amend. As the complaint stands, it alleges these defendants entered into the agreement. For the reasons stated in considering the complaint as against the other defendants, it does not state facts sufficient to constitute a cause of action against the members of the Committee or the investigator. The complaint avers that with respect to all matters alleged these defendants "acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities." These defendants argue they cannot be sued for the same acts both in their official capacities and in their personal capacities. [fol. 273] In view of what we have said it is unnecessary to decide the point.[*]

[*] See *Laughlin* v. *Rosenman,* App. D.C., 163 F. 2d 838, 843; *Cooper* v. *O'Connor,* App. D.C., 107 F. 2d 207, 210; *Reed* v. *Molony,* 38 Cal. App. 2d 405, 411; 67 CJS 417, Sec. 125.

The judgments are affirmed.

Vallée, J.

We concur.

Shinn, P.J., Wood, J.

[fol. 274] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

ORDER DENYING PETITION FOR REHEARING—
July 11, 1956

Civil Nos.
20769 WILSON v. LOEW'S INC.
21100 WILSON v. LOEW'S INC.

The Court: Petition for rehearing denied.

[fol. 275] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

WILSON, *et al.*, Appellants,

v.

LOEW'S INCORPORATED, *et al.*, Defendants;
ASSOCIATION OF MOTION PICTURE PRODUCERS, INC., *et al.*,
Respondents.

WILSON, *et al.*, Appellants,

v.

LOEW'S INCORPORATED, *et al.*, Defendants;
DOYLE, *et al.*, Respondents.

ORDER DENYING HEARING

After Judgment by District Court of Appeal
2nd District, Division 3, Civ. Nos. 20769, 21100

Appellants' petition for hearing Denied.

Carter, J. is of the opinion that the petition should be granted.

Gibson, Chief Justice.

Filed, Aug. 8, 1956, William I. Sullivan, Clerk, By S. F. Deputy.

William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 12th day of September A. D. 1956.

William I. Sullivan
By Crabtree, Deputy Clerk.

[Seal]

[fol. 276] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 21, 1957

The petition herein for a writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 333

MICHAEL WILSON, GALE SONDERGARD, HOWARD DA SILVA, JOHN HOWLAND CHAMBERLIN, FRED GRAF, ALVIN HAMMER, DONALD A. GORDON, ROBERT LEES, ROBERT L. RICHARDS, WALDO SALT, PHILIP STEVENSON, LOUISE ROUSSEAU, ALFRED LEWIS LEVITT, PAUL JARRICO, ABRAHAM LINCOLN POLONSKY, WILMA SHORE, HERTA UERKVITZ, PAUL PERLIN, GUY ENDORE, EDWARD F. HUEBSCH, FREDERIC L. RINALDO, LOUIS SOLOMON and ANNE REVERE,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation; PARAMOUNT PICTURES, INC., a corporation; COLUMBIA PICTURES CORPORATION, a corporation; R.K.O. RADIO PICTURES, INC., a corporation; WARNER BROTHERS PICTURES, INC., a corporation; REPUBLIC PRODUCTIONS, INC., a corporation; SAMUEL GOLDWYN STUDIOS, INC., a corporation; HAL E. ROACH STUDIO, INC., a corporation; TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation; UNIVERSAL PICTURES COMPANY, INC., a corporation; WARNER BROS. PICTURES DISTRIBUTION CORP., a corporation; WALD-KRASNA PRODUCTIONS, INC., a corporation; UNITED STATES PICTURES, INC., a corporation; STANLEY KRAMER COMPANY, a corporation; STANLEY KRAMER PRODUCTIONS, INC., a corporation; SOL LESSER PRODUCTIONS, INC., a corporation; CITADEL PICTURES, a corporation; MOTION PICTURE ASSOCIATION OF AMERICA, INC., a corporation; SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS, a corporation; L. B. MAYER, HOWARD HUGHES, E. B. MANNIX, Y. FRANK FREEMAN, HENRY GINSBERG, HARRY COHN, BEN B. KAHANE, DORE SCHARY, HARRY M. WARNER, JACK WARNER, HERBERT J. YATES, SAMUEL GOLDWYN, HAL E. ROACH, WALTER WANGER, JOSEPH M. SCHENCK, STANLEY E. KRAMER, SOL LESSER, LEO SPITZ, DARRYL ZANUCK, JAMES GRANGER, JOHN S. WOOD, FRANCIS E. WALTER, MORGAN M. MOULDER, CLYDE DOYLE, JAMES B. FRAZIER, HAROLD E. VELDE, BARNARD W. KEARNEY, DONALD L. JACKSON, CHARLES E. POTTER, LOUIS J. RUSSELL, WILLIAM WHEELER, 1 DOE CO., a corporation; etc.,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

ROBERT W. KENNY,
2425 Beverly Boulevard,
Los Angeles 4, California,

BEN MARGOLIS,
112 West Ninth Street,
Los Angeles 15, California,
Attorneys for Petitioners.

SAMUEL ROSENWEIN,
414 South Niagara Street,
Burbank, California,
Of Counsel.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. .....

MICHAEL WILSON, GALE SONDERGARD, HOWARD DA SILVA, JOHN HOWLAND CHAMBERLIN, FRED GRAF, ALVIN HAMMER, DONALD A. GORDON, ROBERT LEES, ROBERT L. RICHARDS, WALDO SALT, PHILIP STEVENSON, LOUISE ROUSSEAU, ALFRED LEWIS LEVITT, PAUL JARRICO, ABRAHAM LINCOLN POLONSKY, WILMA SHORE, HERTA UERKVITZ, PAUL PERLIN, GUY ENDORE, EDWARD F. HUEBSCH, FREDERIC I. RINALDO, LOUIS SOLOMON and ANNE REVERE,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation; PARAMOUNT PICTURES, INC., a corporation; COLUMBIA PICTURES CORPORATION, a corporation; R.K.O. RADIO PICTURES, INC., a corporation; WARNER BROTHERS PICTURES, INC., a corporation; REPUBLIC PRODUCTIONS, INC., a corporation; SAMUEL GOLDWYN STUDIOS, INC., a corporation; HAL E. ROACH STUDIO, INC., a corporation; TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation; UNIVERSAL PICTURES COMPANY, INC., a corporation; WARNER BROS. PICTURES DISTRIBUTION CORP., a corporation; WALD-KRASNA PRODUCTIONS, INC., a corporation; UNITED STATES PICTURES, INC., a corporation; STANLEY KRAMER COMPANY, a corporation; STANLEY KRAMER PRODUCTIONS, INC., a corporation; SOL LESSER PRODUCTIONS, INC., a corporation; CITADEL PICTURES, a corporation; MOTION PICTURE ASSOCIATION OF AMERICA, INC., a corporation; SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS, a corporation; L. B. MAYER, HOWARD HUGHES, E. B. MANNIX, Y. FRANK FREEMAN, HENRY GINSBERG, HARRY COHN, BEN B. KAHANE, DORE SCHARY, HARRY M. WARNER, JACK WARNER, HERBERT J. YATES, SAMUEL GOLDWYN, HAL E. ROACH, WALTER WANGER, JOSEPH M. SCHENCK, STANLEY E. KRAMER, SOL LESSER, LEO SPITZ, DARRYL ZANUCK, JAMES GRANGER, JOHN S. WOOD, FRANCIS E. WALTER, MORGAN M. MOULDER, CLYDE DOYLE, JAMES B. FRAZIER, HAROLD E. VELDE, BARNARD W. KEARNEY, DONALD L. JACKSON, CHARLES E. POTTER, LOUIS J. RUSSELL, WILLIAM WHEELER, 1 DOE CO., a corporation; etc.,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

Petitioners pray that a writ of certiorari issue to review the judgments of the District Court of Appeal for the

State of California, Second Appellate District, Division Three, affirming judgments rendered by a judge of the Superior Court of Los Angeles County sustaining demurrers filed by respondents and dismissing petitioners' complaint in the above entitled cause, without leave to amend.

Opinions Below.

The opinion of the District Court of Appeal is reported at 142 A. C. A. 191, 298 P. 2d 152 and is set forth in Appendix A to this petition. The opinion of the Superior Court is not reported and is set forth in Appendix B to this petition. No written opinion was rendered by the Supreme Court of the State of California denying the petition for hearing, except that Mr. Justice Carter was of the opinion that the petition should be granted [R. 275].[1]

Jurisdiction.

The judgments of the District Court of Appeal were made and entered on June 11, 1956 [App. A; R. 247]. A timely petition for rehearing was filed in the District Court of Appeal and denied on July 11, 1956 [R. 199]. A timely petition for hearing by the Supreme Court of the State of California was filed and denied on August 8, 1956 [App. C; R. 275], Mr. Justice Carter being of the opinion that the petition should be granted. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

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[1]The reference "R" is to the pages of the certified record filed herein with this petition.

Questions Presented.

The questions presented herein arise out of the sustaining without leave to amend of a demurrer to a complaint. The complaint alleges that a combination of respondent motion picture companies, exercising a monopoly of employment opportunities in that industry, together with certain members and an investigator of the House Committee on Un-American Activities, by concerted agreement and conduct have excluded petitioners, who had long and successful professional careers in the motion picture industry, from all employment opportunities in that industry. The cause for such exclusion is that petitioners have either invoked the privilege against self-incrimination before the said House Committee or when named as Communists before that committee have failed voluntarily to appear and testify without invocation of their constitutional privileges. The Court below based its decision on the absence of an allegation in the complaint that petitioners had specific contracts of employment or the expectation of such specific contracts, holding that any individual who asserts his Fifth Amendment privilege may lawfully be excluded from all opportunity to pursue a calling if he does not have a specific contract of employment or the expectation of such a specific contract in the industry from which he is excluded. The questions presented under the aforesaid circumstances are:

1. Whether this Court has jurisdiction to review the judgments of the state court dismissing petitioners' complaint on respondents' demurrers.

2. Whether the judgments of the state court dismissing petitioners' complaint on respondents' demurrers as aforesaid was contrary to law and the supremacy clause of Article VI of the Constitution, deprived petitioners of

their liberty without due process of law and denied petitioners the equal protection of the laws in violation of the equal protection and due process provisions of the Fourteenth Amendment.

Constitutional Provisions and Statutes Involved.

The pertinent text of the Constitutional provisions and statutes involved are set forth in Appendix D to this petition.

Statement of the Case.

The complaint herein alleging the following facts was dismissed upon demurrers without leave to amend.

(a) Petitioners are by profession motion picture actors, actresses, writers, story editors, research workers and grips, respectively, having had from five to twenty-five years' experience in their professions and having acquired reputations for excellence of work in the motion picture industry and won high esteem as such professional persons in the said industry, all of which was known to respondents [R. 66, 75, 77-78, 80-82, 84-85, 87-89, 91-92, 94-96, 98-99, 101-102, 104-105].

(b) The respondent motion picture producers and distributors [R. 66-71] between them control all motion picture production and distribution in the United States and all motion picture employment opportunities in the United States for actors, writers, directors, producers and other employees in the said industry [R. 71].

(c) With respect to the matters alleged in the complaint, the three remaining respondents acted both in their official capacity with relation to the House Committee on Un-American Activities and individually in non-official capacities [R. 72].

(d) On and prior to March, 1951, and continuously thereafter, respondents and each of them agreed with each other as follows:

1. To refuse employment to and exclude from employment in the said industry all employees and persons seeking employment who were subpoenaed as witnesses before the said House Committee and who, relying on their rights and privileges under the Constitution, including the privilege against self-incrimination under the Fifth Amendment, refused to answer questions concerning their political affiliations, associations and beliefs.

2. To refuse employment to and exclude from employment all persons and employees who were named before said Committee as Communists and who failed to appear voluntarily before said House Committee to answer all inquiries without assertion of constitutional privileges.

3. To refuse employment to and exclude from employment all persons and employees who were subpoenaed to appear as witnesses before said Committee and who failed for any reason to appear and testify fully.

4. To refuse employment to and exclude from employment all persons and employees who were suspected of ever having been Communists or having any associations with Communists and who refused or failed voluntarily to appear before said Committee or its agents and waive and surrender their constitutional rights and privileges and testify or give statements fully disclosing their own political affiliations, associations and beliefs and those of their families, friends, associates and acquaintances [R. 72-73].

(e) Respondents and each of them maliciously and without justification undertook to and did induce and persuade each other, and other employers in the said industry, to desist and refrain from employing and to refuse employment to all such aforesaid persons and employees, with the intent to prevent such employees and other persons from having or obtaining employment in the said motion picture industry [R. 73].

(f) As a part of the aforesaid agreement, and as one of the means of effectuating it, all of the respondents have published and circulated and are now publishing and circulating throughout the entire industry a list containing the names of such employees and other persons with the direction and intent that they be not employed [R. 73].

(g) The purpose of the aforesaid agreement is as follows:

1. To limit, control and direct the political activities of respondents' employees.

2. To coerce and influence said employees through and by means of threat of discharge and loss of employment to refrain from adopting or following any course or line of political action and activity not acceptable to the said House Committee.

3. To limit employment in the motion picture industry to those persons whose political beliefs are acceptable to the said Committee.

4. To limit the production of motion pictures by said industry to those the content of which is acceptable to the said Committee [R. 74].

(h) Petitioners, eighteen in number, appeared on various dates in 1951 and 1952 as witnesses before the said House Committee pursuant to subpoena and refused, re-

spectively, to answer certain questions concerning their political affiliations, beliefs and associations, basing their refusal upon their constitutional rights including the privilege against self-incrimination under the Fifth Amendment to the Constitution [R. 73, 76-78, 80-81, 83-84, 86-91, 93-94, 97-98, 105].

(i) Petitioners, five in number, on various dates in 1951 were named as Communists, respectively, by some witness appearing before the said House Committee. Petitioners failed and refused to voluntarily appear before the said Committee to answer questions concerning their political affiliations, beliefs and associations, basing their refusal upon their constitutional rights including their privilege against self-incrimination under the Fifth Amendment [R. 95, 100-102, 104].

(j) By reason of the acts of and pursuant to the aforesaid agreement of respondents, petitioners ever since the dates aforesaid have been and are refused and excluded from employment in the motion picture industry by these respondents and all other employers in said industry; and petitioners will henceforth continue to find it impossible to obtain employment in the profession to which they have devoted a major part of their entire lives and energies [R. 73, 76-78, 80-81, 86-91, 93-94, 95, 97-98, 100-102, 104, 105].

(k) Petitioners have suffered pecuniary loss and irreparable injury and pray for money damages and injunctive relief [R. 106-8].

How Federal Questions Are Presented.

An original complaint was submitted by these petitioners against respondents on July 17, 1953 and demurrers thereto were sustained with leave to amend on October 5, 1953 [R. 64]. The first amended complaint, the complaint involved herein, was filed on October 19, 1953 [R. 65-108]. A demurrer was filed on behalf of the respondent motion picture producers and distributors [R. 109-36] and sustained by the judge of the Superior Court on August 2, 1954, without leave to amend [R. 152-3]. A separate demurrer to the same amended complaint was filed by the remaining three respondents, the members of the legislative committee and its investigator, on December 15, 1953 [R. 161-2], and sustained, but with leave to petitioners to amend [R. 151]. Petitioners having elected to stand on their amended complaint, the said complaint was dismissed on the motion of the said remaining three respondents on September 14, 1954 [R. 172-3].

A written memorandum was rendered by the judge of the Superior Court in sustaining the aforesaid demurrers to petitioners' complaint (App. B). Disregarding respondents' argument that petitioners were without any legally protected interest because of the absence of an allegation showing that petitioners had an existing contract of employment or a reasonable prospect of one, the *trial court accepted petitioners' standing to sue for the invasion of their rights as set forth in the complaint* (App. B, pp. 21-3). The trial court held, however, that the burden was upon petitioners to plead lack of justification for respondents' conduct, and held that the complaint failed to plead facts showing that respondents' concerted agreement was not justified under the circumstances (App.

B, pp. 23-32). With respect to the remaining three respondents, the court construed the complaint as alleging a purposeful interference by strangers with the possibility of business relations (App. B, p. 32), but held that the facts showing a tortious inducement of the refusal to enter into business relations had not been alleged (App. B, pp. 33-4).

On appeal to the District Court of Appeal, petitioners urged that the trial court had erroneously placed the burden of pleading lack of justification upon petitioners, that the burden of pleading and proving justification for their admitted concerted agreement and wrongdoing was upon respondents, and that the judgments of the Superior Court deprived petitioners of their liberty to pursue their chosen callings in violation of the applicable provisions of the state Constitution and the Fourteenth Amendment to the Constitution of the United States. Respondents, on the other hand, urged that petitioners were without any legally protected interest because of the failure to allege the existence or prospect of a specific contract of employment, and urged further that even if the burden of pleading justification was upon respondents, such justification was apparent in the complaint if the court by judicial notice incorporated into the pleadings allegations that the Communist Party advocates and teaches the forcible overthrow of the Government, that a claim of the privilege against self-incrimination after inquiry concerning membership in the Party gives rise to the inference that the person claiming the privilege is dedicated to the forcible overthrow of the Government, and, by the same process of judicial notice, that employers in the motion picture industry under the circumstances must combine to exclude such persons so claiming their con-

stitutional privilege in order to protect their economic interests which again the court could notice would be jointly affected.

The opinion of the District Court of Appeal (App. A) disregarded the rulings of the Superior Court. The District Court of Appeal held solely that the complaint against all of the respondents was insufficient because no facts were alleged showing interference with any legally protected interest of petitioners; that there was no allegation of an existing or prospective specific contract or business relationship, nor any allegation from which such relationship could be inferred (App. A, p. 16). The Court held that "the most that is alleged is a hope or expectation of employment" (App. A, p. 16) and that this was not a sufficient allegation. The Court stated that "in view of our conclusion, we do not reach other points argued by counsel" (App. A, p. 18). Leave to amend was denied (App. A, pp. 17-18).[1a]

A petition for rehearing was duly filed in the District Court of Appeal by the petitioners [R. 175-188]. The petitioners urged that they had been unlawfully denied leave to amend [R. 176-180]; that the complaint stated at least a cause of action for an injunction, by pleading

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[1a]By way of *dicta*, the court held that it would judicially notice that the Communist Party is "a 'conspiratorial and revolutionary junta,' one of whose objectives is the overthrow of our government by force and violence" (App. A, p. 7), so that an inquiry at a legislative hearing concerning a person's past or present membership in the Communist Party, or the statement of a witness that a person has been such a member, has "nothing whatever to do with their political affiliations" (App. A, p. 7), and such latter allegations in a complaint can be disregarded and the aforesaid facts judicially noted substituted in their place in determining the sufficiency of the complaint. This construction of the complaint, however, was not any part of the court's basis for its affirmance of the judgments of dismissal.

the injury of total exclusions from pursuit of a calling within the motion picture industry, apart from the question as to whether a cause of action for monetary damages was stated [R. 180-4]; and that the holding of the court that petitioners were without legal redress against the admitted wrongdoers who deprived petitioners of their right to pursue their chosen avocations merely because petitioners had not alleged the existence or probability of a contract of employment denied petitioners the equal protection of the laws and deprived them of their liberty and property without due process of law in violation of the equal protection and due process provisions of the Fourteenth Amendment [R. 184-7]. The petition for rehearing was denied [R. 199].

A petition for hearing was thereafter duly filed in the Supreme Court of the State of California [R. 189-246] raising the same aforesaid constitutional questions. The petition for hearing was denied without opinion, Mr. Justice Carter being of the opinion that the petition should be granted [R. 275].

Reasons for Granting the Writ.

The case herein was determined upon demurrer, and the facts properly pleaded may therefore be taken as admitted. *C. B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 565; *Ward v. Love County*, 253 U. S. 17, 23; *Postal Telegraph Cable Co. v. City of Newport*, 247 U. S. 464, 474.[1b] There is thus no dispute on the essential facts. Petitioners seek to pursue their chosen callings in the motion picture industry. Respondents, by force of their monopolistic control of all employment op-

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[1b]The rule is of course the same in California. *Hauger v. Gates*, 42 Cal. 2d 752, 269 P. 2d 609; *Marden v. Bailard*, 124 C. A. 2d 458, 268 P. 2d 809.

portunities in the industry, have agreed in combination that no person shall enter the industry who claims the privilege of the Fifth Amendment in a legislative inquiry, or who is named as a Communist in such inquiry and fails to voluntarily appear before said legislative inquiry and answer all questions without assertion of constitutional privileges. The combination and agreement to act in concert is admitted. It is also admitted that pursuant to this agreement, respondents have circulated a blacklist throughout the entire industry and induced other employers in the industry to refuse employment to all persons covered by respondents' agreement. It is conceded that by reason of the acts of and pursuant to the agreement of respondents, petitioners have been refused and excluded from employment in the industry and will continue to find it impossible to pursue their chosen callings because of the conduct of respondents. No issue of the right of an individual employer to hire or discharge an employee, with or without cause, is presented here. The gist of the wrong is respondents' monolithic combination which concededly makes it impossible for petitioners to enter the market of their choice and dispose of their skills according to their own will free from oppressive interference.

In this posture of the case, with the fundamental right so plainly conceded and the wrongful invasion of the right so freely admitted, the courts below have held that petitioners are without remedy, legal or equitable. The basis of this ruling is that petitioners have alleged no interest which the law can protect because petitioners were duty bound to assert the existence of a contract of employment or the reasonable prospect of one before they could obtain relief from the wrongdoers. In short, the state courts here held that persons deprived of their freedom

to pursue a chosen calling under the Constitution are without remedy unless such persons first obtain the fruits of the calling which the wrongdoer has admittedly made it impossible to obtain.

Since respondents will undoubtedly urge that the aforesaid circuitous reasoning justifies the view that the judgment below rests upon a "non-federal" ground, we treat the issue of this Court's jurisdiction to grant certiorari first, and then pass on to the discussion of the merits of petitioners' claims herein.

1. On the issue of jurisdiction, it is fundamental that a state, acting through its judiciary, may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is or was afforded some real opportunity to protect it. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673, 682; *Truax v. Corrigan*, 257 U. S. 312, 329. It is also fundamental that when a specific federal right is set up and claimed in a proceeding, the question whether the right was denied, or not given due recognition by the state court is a question as to which the claimants are entitled to invoke the judgment of this Court. It is the province of this Court to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that are plainly untenable. *Ward v. Love County*, 253 U. S. 17, 22; *Lawrence v. State Tax Comm'n*, 286 U. S. 276, 282. "A State court cannot sterilize federal claims by putting on the adjudication a local label." *Angel v. Buffington*, 330 U. S. 183, 190.

We approach the question of jurisdiction, therefore, first by discussing the character of the claimed federal

right, and then by discussing the inadequacy of the ground advanced by the state courts for denying the right.

(a) The liberty to pursue a calling is one of the most fundamental of all constitutional freedoms, as essential as the right to life itself. *Cummings v. Missouri*, 4 Wall. 277, 321; *Truax v. Raich*, 239 U. S. 33, 38. "Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." *Smith v. Texas*, 233 U. S. 630, 636. The right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. *Truax v. Raich, supra*, p. 38. See also, *Meyer v. Nebraska*, 262 U. S. 390, 399; *Pierce v. Society of the Sisters*, 268 U. S. 510, 534; *Takahashi v. Fish Comm'n*, 334 U. S. 410, 421.

The Constitution does more than protect the choice of a calling; it protects the right *to pursue* a calling. It is the characteristic of the right that it shall not be held "at the mere will of another" (*Yick Wo v. Hopkins*, 118 U. S. 356, 370) and that it shall be exercised freely "and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion" the pursuit of a chosen avocation or livelihood (*Allgeyer v. Louisiana*, 165 U. S. 578, 589). ". . . and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired." *International News Service v. The Associated Press*, 248 U. S. 215, 236. Thus, the right to pursue a common calling must necessarily include the

right to negotiate with prospective employers or customers free from unlawful restrictions and burdens. "It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it. The cup of Tantalus would be a fitting symbol for such a mockery. Our Constitution recognizes no such notion." *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 742, 65 Atl. 165, 171.

(b) The rejection of petitioners' claimed federal rights, on the undisputed state of the record, for the reasons given by the state courts cannot defeat this Court's jurisdiction to decide the federal questions here presented, it is respectfully submitted. In the first place, by its necessary operation and effect, the judgments below reject the claims of the petitioners which specifically set forth a wrongful deprivation of their right to pursue a livelihood with prayers for money damages and injunctive relief. The federal questions thus presented covered the whole case, and were of such a nature that the rights of the petitioners could not be finally determined without deciding the federal questions.

In ruling that no relief, legal or equitable, was available to petitioners to protect their constitutional right to pursue a calling unless they first obtained a contract of employment or demonstrated a prospect of a specific contract in the motion picture industry, the judgments of the state court necessarily denied petitioners' claims under

the Constitution and this Court has jurisdiction to inquire whether petitioners' claims should be sustained, at least to the extent of putting the admitted wrongdoer to the proof justifying their conduct. *West Chicago Street Railroad Co. v. Illinois,* 201 U. S. 506, 519-20. "The claim of a federal right or immunity specifically set up from the outset went to the very root of the case and dominated every part of it." *C. B. & Q. Ry. Co. v. Drainage Commissioners,* 200 U. S. 276, 283; *Rogers v. Alabama,* 192 U. S. 226, 230; *St. Louis S. W. Ry. Co. v. Arkansas,* 217 U. S. 136, 148-9. As Mr. Justice Holmes stated in *Rogers v. Alabama, supra,* p. 230:

> "It is a necessary and well established rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

In the second place, not only do the judgments below necessarily deny petitioners' asserted federal rights, but the grounds of the denial are so interwoven with the federal questions presented by petitioners as not to be an independent matter or sufficiently broad to sustain the judgments without any decision of the federal question. The state courts did not uphold petitioners' constitutional rights, and bar relief because of an independent matter such as construction of a private contract, waiver, estoppel, laches or statute of limitations. On the contrary, the courts decided that petitioners were without right to the protections of the courts against wrongful invasion of petitioners' freedom to pursue their callings unless petitioners first obtained a contract or could prove a reasonable prospect of one. In order to decide the validity of the ruling of the courts below, it becomes essential there-

fore to decide the breadth and scope of the constitutional protection for the federal right which petitioners asserted. Under such circumstances, the jurisdiction of this Court appears plain. *Creswill v. Knights of Pythias,* 225 U. S. 219, 261; *Postal Telegraph Cable Co. v. Newport,* 247 U. S. 464, 475; *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U. S. 157, 164; *Abie State Bank v. Bryan,* 282 U. S. 765, 773.

In the third place, the grounds advanced by the state courts for denying petitioners any redress are clearly untenable because the grounds are themselves constitutionally invalid or at least raise constitutional questions which this Court alone can decide. As was indicated in the discussion aforesaid on the nature and character of the fundamental right to pursue a calling, it is rationally impossible to draw a distinction between a right of employment in a chosen calling and a right to acquire employment in the same calling. It is simply arbitrary and capricious to hold that as against an admitted wrongdoer, courts will afford protection of the constitutional right to work for a living if the wrongdoer has induced a breach of contract or the reasonable expectancy of one, but will decline to give any remedy for the wrong, even as to the future, if those who are deprived of their right to pursue a calling are unable to prove that their plain right has ripened into fruition. This would be a sheer deprivation of liberty without due process of law. *Truax v. Corrigan,* 257 U. S. 312. The constitutional right to earn a living surely exists for the unemployed as well as the employed. Where "the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question," this Court's

jurisdiction is clear. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157, 164.

In addition, the ruling of the courts below operates to deny petitioners the equal protection of the laws. Its effect is to give the fullest protection of the law to those who have a contract of employment or reasonable prospect of one. No protection is given to one who seeks to earn a living, who seeks to compete with others in his chosen calling. Such a classification is arbitrary and without any substantial basis in fact or reason, placing as it does the maintenance of private contracts on a higher scale in our constitutional system than the right to pursue a calling. See, *Truax v. Raich*, 239 U. S. 33. The ruling also grants immunity to one class of wrongdoers while subjecting another class to legal sanctions without any reasonable basis for such classification. See *Yick Wo v. Hopkins*, 118 U. S. 356, 370. Moreover, to grant immunity to one class of persons (the respondents here) so as to deprive another class (the petitioners here) of personal or property rights is itself a denial of equal protection of the laws. *Truax v. Corrigan*, 257 U. S. 312, 333.

It therefore appears that the grounds advanced below for denying petitioners their claimed federal rights are themselves intrinsically violative of petitioners' liberties, raise questions of constitutional importance which again only this Court can decide, and are therefore not sufficiently independent of the federal questions involved in the entire case to defeat this Court's jurisdiction. Where the specific state court ruling restricts, undermines or destroys a federal right under the laws of Congress or the Constitution, this Court has jurisdiction to review. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464,

475-6; *American Railway Express Co. v. Levee,* 263 U. S. 19, 21; *Hill v. Smith,* 260 U. S. 592, 594; *Young v. Ragen,* 337 U. S. 235, 238.

Finally, it is submitted that a fair reading of the uncontradicted allegations contained in petitioners' complaint does not support the finding upon which the opinion of the state court was grounded. This Court of course must itself decide whether a pleading sufficiently sets up a claim of right under the federal Constitution. *Boyd v. Thayer,* 143 U. S. 135, 181; *Carter v. Texas,* 177 U. S. 442, 447; *First National Bank v. Anderson,* 269 U. S. 341, 345-6. "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds." *Davis v. Wechsler,* 263 U. S. 22, 24. See, to the same effect, *Brown v. Western R. of Alabama,* 338 U. S. 294, 296. Moreover, it is settled that this Court will review a state court's findings where a federal right has been denied as the result of a finding shown by the record to be unwarranted and without support; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. *Union Pac. R.R. Co. v. Pub. Serv. Comm'n,* 248 U. S. 67, 69; *Pollock v. Williams,* 322 U. S. 4, 13, n. 21; *Niemotko v. Maryland,* 340 U. S. 268, 271; *Hooven & Allison Co. v. Evatt,* 324 U. S. 652, 659.

It is in this light that petitioners' pleading below should be examined. A fair reading of the complaint reveals that petitioners not only were possessed of an established background of experience in their chosen calling, but

that the likelihood and expectancy of obtaining employment in the industry was reasonably certain if the admitted wrongful conduct of respondents had not made this impossible. Each of the petitioners allege that he or she "has devoted a major part of his entire life and energy" in the motion picture industry [R. 74 *et seq*]. It is admitted that each has had from more than five to twenty-five years' experience in their professions [R. 66 *et seq.*]. It is also alleged, and not denied, that the respondents well knew that each of the petitioners "has acquired a reputation for excellence of work in the motion picture industry and has won high esteem" [R. 66 *et seq.*]. Moreover, the complaint alleges, and it is not denied, that "as a result thereof and by reason of the acts of and pursuant to the agreement of the defendants," petitioners have been refused and excluded "from employment in the said industry" [R. 73 *et seq.*]. "Therefore" said petitioners "will henceforth continue to find it impossible to obtain employment in the profession" unless the injunctive relief prayed for is granted [R. 73-4 *et seq.*].

The aforesaid allegations, it is respectfully submitted, fairly construed, showed that petitioners possessed the experience, esteem and reputation in the industry which justified the conclusion that they could reasonably expect to obtain employment in the industry, and that it was solely because of respondents' conduct that petitioners were unable to contract and dispose of their labor, art and skill. *Cf., Brown v. Western R. of Alabama*, 338 U. S. 294. This erroneous construction of the pleading appears to be the result of a confusion between the principles applicable to a wrongful deprivation of a right to pursue a calling and the tortious inducement of the breach

of a specific or contemplated specific contract or advantage.[2]

The gravamen of the complaint here plainly is the concerted and wrongful deprivation of the right to pursue a calling, the liberty to follow one's chosen employment. *Parker v. Lester*, 227 F. 2d 708, 717 (C. A. 9, 1955). The courts below appear to have fallen in the error of denying all redress, legal and equitable, for such admitted injury upon the mistaken assumption that the petitioners would find it difficult to prove any ascertainable damages. Fundamental rights, when plainly invaded, however, are not unprotected merely because the wrongdoer has made the extent of his wrongdoing uncertain. See, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 252; *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 266; *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555, 564; *Angle v. Chicago, St. P. Elec. Ry.*, 151 U. S. 1, 10.[3] Moreover, the complaint clearly alleges a cause of action for equitable relief from any further invasion of petitioners' asserted federal rights, and it was a palpable denial of due process to withdraw even this protection from the petitioners.

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[2]The sole California decision relied upon by the Court below, *Campbell v. Rayburn*, 129 Cal. App. 2d 232, 276 P. 2d 671, and the cases cited therein [R. 259] did not deal with the constitutional right to earn a living or pursue a business, but the loss of a specific contract or advantage. In none of these situations was it alleged or proved that the complainants had been deprived of the right to follow their chosen calling.

[3]See also, *Louis Kamm, Inc. v. Flink*, 113 N. J. L. 582, 175 Atl. 62, 68; *Godin v. Niebhur*, 236 Mass. 350, 128 N. E. 406, 407; *Doremus v. Hennesay*, 176 Ill. 608, 52 N. E. 924, 925-6; *Meadowmoor Dairies v. Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. 2d 308; Cooley, *Torts* (4th ed.), vol. 2, Sec. 230, pp. 196-7; Prosser, *Torts* (1955), Sec. 107, pp. 745-8; *Restatement of Torts*, Sec. 766, p. 52; 86 C. J. S., *Torts*, Sec. 43, p. 955.

Truax v. Raich, 239 U. S. 33, 38; *International News Service v. The Associated Press*, 248 U. S. 215, 236.[4]

For all of the foregoing reasons, it is submitted that this Court has jurisdiction to review the substantial federal questions presented in this petition for a writ of certiorari, to a discussion of which questions we now turn.

2. On the merits, the case herein bristles with substantial federal questions which should be decided by this Court. The courts below have decided these questions in a way not in accord with applicable decisions of this Court. Moreover, the central federal question is one of substance not heretofore determined by this Court.

If the respondents, monopolizing all employment opportunities in the motion picture industry, had agreed among themselves to hereafter exclude all Negroes, Republicans or Jews from the industry, and the state courts had refused all redress to the persons affected, it appears clear that this Court would consider the matter ripe for adjudication. *United Public Workers v. Mitchell*, 330 U. S. 75, 100; *Wieman v. Updegraff*, 344 U. S. 183, 191. A state court which upheld such an agreement would, of course, put the sanction of government behind it. *Shelley v. Kramer*, 334 U. S. 1; *Hurd v. Hodge*, 334 U. S. 24; *Barrows v. Jackson*, 346 U. S. 249. The central issue here is whether affected persons following a like calling are without similar recourse to the Constitution when the agreement by the same monopolistic combination excludes from the industry all those who claim

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[4] ". . . . . a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech." Mr. Justice Holmes in *Swift and Co. v. United States*, 196 U. S. 375, 395.

the privilege against self-incrimination guaranteed by the federal Constitution before a federal legislative inquiry, or who, when named as Communists in such legislative inquiry, fail to voluntarily appear and answer all questions without invocation of their Constitutional privileges.

It is important to note at the outset that this is not a suit against an individual employer for breach of contract of employment, nor a suit against a third party for inducing a breach of such contract. "The evil is in the combination." *United States v. Reading Co.*, 226 U. S. 324, 353. Each of the parties to the agreement have surrendered their power of decision and agreed to abide by the will of the combination. Petitioners are powerless to enter the market and negotiate with free employers on a free basis. Respondents admittedly monopolize all employment opportunities and petitioners have no means to neutralize the conduct of respondents by dealing with other individual employers. Indeed, it is admitted that the combination makes this an utter impossibility by overtly inducing other employers to abide by the terms of respondents' agreement and by the circulation of a blacklist throughout the industry. Competition among employers for employees, as well as among employees for employers, is effectively throttled. The right of petitioners to pursue their chosen callings is permanently ended.

It is also important to note that this case arises on demurrer. Respondents have neither pleaded a general denial nor justification for their conduct. Thus, the petitioners, while pleading a complete deprivation of their right to earn a living, have been denied all redress in the courts without the need for the admitted wrongdoers

to either plead or prove that their conduct was warranted. It is difficult to posit a more flagrant instance of denial of due process of law. Mr. Justice Holmes stated in *Aikens v. Wisconsin,* 195 U. S. 194, 204:

> "It has been considered that, *Prima facie,* the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."

See also, *Owen v. Williams,* 322 Mass. 356, 360, 77 N. E. 2d 318; *Carnes v. St. Paul Stockyards Co.,* 164 Minn. 457, 463, 205 N. W. 630; Bohlen, *Incomplete Privileges to Inflict Intentional Invasions of Interests,* 39 Harv. L. Rev. 307; 84 Am. L. Rep. 43, 79; 26 Am. L. Rep. 2d 1227, 1263.

It is also significant to note initially what the primary purpose of this admitted monopolistic combination is. This combination has arrogated to itself the power, and has for its object, the exclusion of all persons in the United States from their chosen callings in an entire industry who have exercised a federal right in a federal forum, or who have failed to surrender all their constitutional privileges when merely "named" as Communists in a legislative investigation. Petitioners concededly therefore cannot earn their livelihoods solely because, according to the mandate of the combination, they have exercised federal rights or refused to forego them in a federal forum. In short, what the Constitution forbids the government of the United States to do, this nongovernmental combination has undertaken to accomplish. *Cf., Associated Press v. United States,* 326 U. S. 1, 20. Nor has the combination even been required by government, up to this point, to even plead and prove the justi-

fication for snuffing out so summarily the constitutional rights of persons in the United States. See, *Restatement of Torts,* Section 765, Comment a.[5]

Determination of the issues presented in this proceeding requires, therefore, consideration of substantial federal questions and the legal principles applicable thereto.

(a) In a variety of situations, this Court has held that an act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed. *Grenada Lumber Co. v. Mississippi,* 217 U. S. 433, 440; *United States v. United States Gypsum Co.,* 333 U. S. 364, 401; *Steele v. Bulova Watch Co.,* 344 U. S. 280, 287; *Binderup v. Pathe Exchange,* 263 U. S. 291, 312. Lawful acts may become unlawful when taken in concert. "When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part." *Aikens v. Wisconsin,* 195 U. S. 194, 205.

A monopoly of all employment opportunities in an industry does not merely relate to business relations, it

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[5]The evils flowing from the monopolistic control of these respondents has been the subject of recurrent critical comment. Note, *Monopolies, the Motion Picture Industry,* 15 Univ. of Detroit L. J. 178 (1952); Marcus, *Antitrust Laws and the Right to Know,* 24 Ind. L. J. 513, 533 (1949); McDonough and Winslow, *The Motion Picture Industry,* 1 Stanf. L. Rev. 385 (1949). See, *United States v. Paramount Pictures, Inc.,* 334 U. S. 131.

affects the fundamental right to work for a living. What the individual employers can do, severally, by independent action, is essentially different from what they may do collectively, pursuant to an agreement between themselves and by concerted action thereunder.

(b) Respondents are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing. They have been given no power to require citizens to surrender their constitutional privileges. More than this, respondents have purported to do what the Government itself cannot do. Clearly, legislation, which excluded all persons from the motion picture industry who claimed a privilege guaranteed by the Constitution or who declined to surrender their constitutional privileges when named in some legislative inquiry as Communists, would collide with the fundamental law. *Cf., United States v. Lovett,* 328 U. S. 303. Respondents have been relieved by the state courts of any need to prove justification for their concerted conduct, but it is doubtful that the respondents can ever justify the taking of the law in their own hands under the circumstances of this case. The conduct of these respondents trenches upon the supreme law of the land which guarantees the exercise of fundamental rights and privileges. Private choice of means to obtain particular employees in an industry "must yield to the national authority thus exerted." *Eastern States Lumber Ass'n v. United States,* 234 U. S. 600, 613. See also, *Fashion Guild v. Federal Trade Comm'n,* 312 U. S. 457, 465; *American Medical Ass'n v. United States,* 130 F. 2d 233, 248 (C. A. D. C. 1942), aff'd 317 U. S. 519; *United States v. Gypsum Co.,* 333 U. S. 364, 400; *United States v. Motion Picture Patents Co.,* 225 Fed. 800, 808 (D. C. E. D. Pa., 1915).

(c) The character of the rights, the exercise of which this admitted monopolistic combination seeks to punish, should also be noted. So long as the Constitution of the United States remains the supreme law of the land, it can hardly be disputed that the Fifth Amendment stands on equal parity with all other provisions of the federal law. In a series of recent decisions this Court has itself emphasized the vitality of the Fifth Amendment, its importance in the protection of the innocent, and the need to protect the Amendment from subtle encroachments by public or private agencies. *Slochower v. Board of Higher Education,* 350 U. S. 551, 557; *Ullmann v. United States,* 350 U. S. 422, 426; *Quinn v. United States,* 349 U. S. 155, 161; *Emspak v. United States,* 349 U. S. 190, 194. See also Griswold, *The Fifth Amendment Today* (1955), pp. 2-7; Wigmore, *Evidence* (3rd ed.), Sec. 2250; Cooley, *Constitutional Limitations* (8th ed., 1927), vol. 1, p. 647. This Court recognized the privilege guaranteed by the Fifth Amendment as "one of the most valuable prerogatives of the citizen." *Slochower v. Board of Higher Education, supra,* p. 557. And this Court warned in *Emspak* against perversions of the Amendment's meaning and significance:

> "Otherwise, the great right which the Clause was intended to secure might be effectively frustrated by private pressures." *Supra,* p. 195.

There is a tangential ruling by the court below which points up the infirmity in its decision and in itself requires review by this Court. In its decision, the court below held that the complaint could be implemented by "judicial notice" so that the questions put to petitioners in the legislative inquiry concerning membership in the Communist Party were not, as alleged, questions con-

cerning their "political affiliations," but questions concerning "a conspiratorial and revolutionary junta, one of whose objectives is the overthrow of our government by force and violence" [R. 255]. Therefore, the purpose of the agreement was not to limit and control petitioners' "political activities" as alleged in the complaint, but to limit the activities of those dedicated to forcible overthrow of the Government [R. 257]. Thus, the state courts took judicial notice that an inquiry concerning solely membership in the Communist Party was the same as an inquiry concerning membership in an organization dedicated to the forcible overthrow of the Government, and that refusal to answer an inquiry concerning membership in the Party upon a claim of the privilege against self-incrimination justified the inference as a matter of law that the persons so claiming the privilege were dedicated to the forcible overthrow of the Government.

While the court below did not answer the question whether, even so, the admitted monopolistic combination here was justified in depriving petitioners of their right to earn a living as guaranteed by the Constitution, still it is plain that this peripheral ruling raises substantial federal questions which this Court should adjudicate. From *Schneiderman v. United States,* 320 U. S. 118, to *Dennis v. United States,* 341 U. S. 494, this Court has constantly declined to take judicial notice that the Communist Party advocates the forcible overthrow of the Government. Mr. Justice Reed in *Bridges v. United States,* 346 U. S. 209, 234, stated that "there is no necessary identity in law between Communist Party members" and persons who advocate the forcible overthrow of the Government. See, Section 4(f) of the Internal Security Act (50 U. S. C. 783f). The extension of the doctrine of judicial notice under such circumstances so as to de-

prive persons of their chosen callings constitutes arbitrary state action and a denial of due process of law under the Fourteenth Amendment. *Wieman v. Updegraff*, 344 U. S. 183; *Ohio Bell Tel. Co. v. Comm'n*, 301 U. S. 292, 301-2. In similar vein, a ruling that one who declines to answer a question concerning membership in the Communist Party upon the grounds of the Fifth Amendment is inferentially a person who advocates the forcible overthrow of the Government runs counter to the Constitutional provision, and sanctions imposed thereby are arbitrary and violative of due process of law. *Slochower v. Board of Higher Education*, 350 U. S. 551, 557; *Ullman v. United States*, 350 U. S. 422, 426; *Quinn v. United States*, 349 U. S. 155, 164; *Emspak v. United States*, 349 U. S. 190, 195; Griswold, *The Fifth Amendment Today* (1955); Wigmore, *Evidence* (3rd ed.), vol. VIII, Secs. 2251, 2272a, pp. 308-10, 425.

Finally, the concerted agreement by this monopolistic combination to deprive persons of their calling who are named as Communists in a federal legislative inquiry and who fail to voluntarily appear before the inquiry and answer all questions without invocation of constitutional privileges arrogates powers to this non-governmental group which are denied even to the Government itself and to all its agencies. Under 2 U. S. C. 192, no witness is required to appear before a federal legislative inquiry unless he has been duly "summoned as a witness." Questions must be "pertinent to the question under inquiry" before contempt sanctions can be invoked. The witness may properly invoke his constitutional privileges when the legislative investigation is used to inquire into private affairs unrelated to a valid legislative purpose, or into an area in which Congress is forbidden to legislate. "Still further limitations on the power to investigate are

found in the specific individual guarantees of the Bill of Rights, . . ." *Quinn v. United States,* 349 U. S. 155, 161. There is no power in Government to sweep these rights away; yet the heavy hand of this combination "falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." *Slochower v. Board of Higher Education,* 350 U. S. 551, 558.

It is submitted that the stated purposes and objects of the concerted agreement by the respondents, resulting as it has in the deprivation of fundamental liberties guaranteed by the Constitution, runs afoul of the fundamental law and that the state's action upholding such an agreement should be reviewed by this Court.

(d) The conduct of respondents in thus depriving petitioners of their fundamental right to earn a living was both unlawful in its object and its method, in other respects. In the first place, the object of the monopolistic combination was to interfere with the exercise of a federal right in a federal forum. The state courts have sanctioned an invasion of this right by depriving petitioners of their liberty to work because petitioners exercised legal and constitutional privileges and immunities in such federal jurisdiction. Congress, however, has protected the exercise of these rights by specific enactment. 18 U. S. C. 241 makes it a criminal offense punishable by fine and imprisonment for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, *or because of his having so exercised the same*" (emphasis supplied). See also, 18 U. S. C. 242. These laws have been upheld as a valid exercise

of Congressional power, and under the supremacy clause of the Constitution are binding upon the states. Constitution, Article VI. See, *Hague v. C. I. O.*, 307 U. S. 496; *Logan v. United States*, 144 U. S. 263; *In re Quarles*, 158 U. S. 532; *Motes v. United States*, 178 U. S. 458. The agreement of respondents is therefore contrary to an express provision of law, as well as to the policy of express law. See, Restatement of Torts, Sec. 765, Comment d, p. 45.

In the second place, the overt acts committed by the respondents pursuant to their concerted agreement were *per se* wrongful. Respondents not only induced each other, but also induced other employers in the industry to deny employment to petitioners. The denial of any remedy against those who inflict intentional harm by inducing others not to enter into employment relations with persons seeking work is a violation of due process of law. "The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." *Truax v. Raich*, 239 U. S. 33, 38. See also, *Angle v. Chicago, St. Paul etc. Ry.*, 151 U. S. 1.

In the third place, the circulation of a blacklist by a monopolistic combination of employers who control all employment opportunities in an industry is as much an unlawful deprivation of the right to work as would be the commission of such overt acts as fraud, violence, coercion and intimidation. "The evil of blacklisting rests in the power wielded by a combination to exclude named

persons from pursuing their occupation in certain regions or industries." Note, *Liability for Blacklisting Under the Prima Facie Tort Doctrine,* 51 Col. L. Rev. 398, 399 (1951). See *Fashion Guild v. Fed. Trade Comm'n,* 312 U. S. 457; *Aikens v. Wisconsin,* 195 U. S. 194; *Carlson v. Carpenter Contractors Ass'n,* 305 Ill. 331, 137 N. E. 222.

(e) The complaint alleges that the ultimate aims of the monopolistic combination are to limit and control the political activities of their employees, to coerce said employees to refrain from following any course of political activity not acceptable to the legislative committee, to limit employment in the industry to those persons whose political beliefs are acceptable to the legislative committee and to limit production of motion pictures to those the content of which is acceptable to the said committee [R. 74 *et seq.*]. As discussed aforesaid, the state court held that the complaint does not allege what is plainly alleged, reaching its conclusion by the process of "judicial notice" and inferences of wrongdoing solely from the invocation of a claim of the privilege against self-incrimination. But since this Court is not concluded by the view taken by the state court as to the sufficiency of the allegation when a federal right and privilege is invoked (*Boyd v. Thayer,* 143 U. S. 135, 180), and since the action of the state court was in this respect inconsistent with due process of law as previously discussed, it would follow that the stated additional objectives of this admitted monopolistic combination were clearly unlawful. Neither the legislative committee nor these respondents could combine to deprive petitioners of their livelihood in order to effect a censorship of petitioners' beliefs, opinions and associations. *J. Burstyn, Inc. v. Wilson,* 343 U. S. 495; *Su-*

perior Films v. Dept. of Ed., 346 U. S. 587; *West Va. State Board of Education v. Barnette*, 319 U. S. 624.

3. The complaint was also dismissed, on demurrer, as against the remaining three respondents, the two members of the legislative committee and its investigator. The complaint alleged that these respondents both in their official capacity and individually in non-official capacities [R. 72 *et seq.*] had entered into the concerted agreement with the other respondents with the same objects and purposes, had induced other employers in the industry in the same manner not to employ petitioners and circulated the blacklist in order to carry out the purposes of the monopolistic combination. The court below held that the complaint had been properly dismissed for the same reasons that the complaint had been dismissed against the other respondents [R. 272]. The same federal questions are therefore presented here and we do not repeat our prior discussion. The court below did not pass upon another argument advanced by the remaining three respondents that they could not be sued for the same acts both in their official and personal capacities [R. 272-3]. Aside from the fact that total relief cannot be denied for deprivation of a federal right when the pleading sets forth a supportable claim on at least one theory (*Lewis v. Brautigam*, 227 F. 2d 124, 127, C. A. 5, 1955), no immunity exists in law for public officials who have criminally or tortiously deprived persons of their fundamental rights, whether such persons acted in their "official" or "private" capacities. See, *Ex parte Virginia*, 100 U. S. 339, 348; *United States v. Bramblett*, 348 U. S. 503; *Picking v. Pa. R.R. Co.*, 151 F. 2d 240 (C. A. 3, 1945).

Conclusion.

This Court has jurisdiction to review the substantial federal questions here presented. The petition for a writ of certiorari should be granted, the judgments of the court below reversed, and the parties put to their proof.

Respectfully submitted,

ROBERT W. KENNY,
BEN MARGOLIS,
Attorneys for Petitioners.

SAMUEL ROSENWEIN,
Of Counsel.

APPENDIX A.

Opinion and Judgments of the District Court of Appeal.

In the District Court of Appeal of the State of California. Second Appellate District. Division Three.

Michael Wilson, *et al.*, Appellants, vs. Loew's Incorporated, a corporation *et al.*, Defendants; Association of Motion Picture Producers, Inc., *et al.*, Respondents. Civil Nos. 20769, 21100.

Filed June 11, 1956.

Appeals from judgments of the Superior Court of Los Angeles County. Ellsworth Meyer, Judge. Affirmed.

Kenny & Morris, Thomas G. Nueson, Margolis, McTernan & Branton and Robert W. Kenny for Appellants.

Irving M. Walker, Herman F. Selvin, Loeb & Loeb, O'Melveny & Myers, Mitchell, Silberberg & Knupp, Freston & Files, Wright, Peeler & Garrett, Joseph S. Dubin and Oliver B. Schwab for Respondents in Civ. No. 20769.

Guy Richards Crump and Slate & Sawtelle for Respondents in Civ. No. 21100.

Appeals from two judgments of dismissal. The case is here on an amended complaint, referred to as the complaint. There are 23 plaintiffs and 23 counts. All of the defendants except three are motion picture producers and distributors. Two of the three remaining defendants are members of the Committee on Un-American Activities of the United States House of Representatives and the third is an investigator for that Committee. A demurrer of the motion picture producers and distributors

was sustained without leave to amend and judgment of dismissal entered. One of the appeals is from that judgment. Demurrers of the three remaining defendants to the amended complaint were sustained with leave to amend. Plaintiffs declined to amend and judgment of dismissal followed. The other appeal is from that judgment.

Each count of the complaint relates to only one plaintiff. The counts are identical except for personal data. A statement of the first count will suffice as a statement of the pleading as a whole. It alleges:

1. Plaintiff Wilson is by profession a motion picture writer; has had more than 5 years experience as a writer; has acquired a reputation for work in the motion picture industry; has won high esteem as a writer in that industry; all of which defendants at all times knew.[1]

2. The corporate defendants are engaged in the production and distribution of motion pictures. The corporate and individual defendants, other than the Committee members and the investigator, control directly and indirectly all motion picture production and distribution in the United States and [193] all motion picture employment opportunities for actors, writers, directors, producers, and other employees in that industry.

3. Defendant members of the Committee on Un-American Activities and the investigator at all times and with respect to the matters alleged "acted both in their official capacity with relation to said House Committee

[1]The allegations with respect to the other plaintiffs are identical except that those who are not writers are alleged to be actors, actresses, a story editor, a research worker, and a grip, respectively, with experience ranging from "more than 5" to "more than 25" years.

on Un-American Activities and individually in non-official capacities."

4. Prior to March 1951 and continuously thereafter defendants, and each of them, agreed with each other to refuse employment to, and exclude from employment in the motion picture industry the following persons:

a. All employees and persons seeking employment who had been or thereafter were subpoenaed as witnesses before the Committee on Un-American Activities of the House of Representatives and who refused on constitutional grounds to answer questions "concerning their political affiliations, associations and beliefs."

b. All employees in the industry and persons seeking employment therein who were named before the Committee as Communists or who were subpoenaed to appear as witnesses before the Committee, or who were suspected of ever having been Communists or of ever having had associations with Communists, and who refused or failed to appear before the Committee and waive and surrender their constitutional rights and testify or give statements fully disclosing "their own political affiliations, association and beliefs and those of their family, friends, associates and acquaintances."

c. Defendants, with the intent to prevent such employees and other persons from having or obtaining employment in the motion picture industry, maliciously and without justification undertook to and did induce and persuade each other and other employers in the industry to desist and refrain from employing and to refuse employment to all such employees and other persons.

d. All defendants, as a part of the agreement and as one of the means of effectuating it, have published and cir-

culated throughout the entire motion picture production and exhibition fields a list containing the names of such employees and other persons with the direction and intent that they be not employed. Plaintiff contends defendants wrongfully, maliciously, and without justification or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the industry and [194] to pursue their professions and occupations therein, and have prevented their employment therein.

5. On September 20, 1951 plaintiff Wilson appeared before the Committee pursuant to subpoena. He there refused to answer certain questions "concerning his political affiliations, beliefs and associations" basing his refusal on his constitutional rights, including the privilege against self-incrimination.

6. As a result of such refusal and by reason of the acts of and pursuant to the agreement of defendants, Wilson ever since September 20, 1951 has been and he now is refused and is excluded from employment in the industry. Therefore he will henceforth continue to find it impossible to obtain employment in the profession to which he has devoted a major part of his life and energy.

7. It is plaintiff's belief that the purpose of the agreement is to limit, control, and direct the political activities of defendants' employees; to coerce and influence them through and by means of threat of discharge and loss of employment from adopting or following any course or line of political action and activity not acceptable to the Committee; to limit employment in the industry to those persons whose political beliefs are acceptable to the Committee; and to limit the production of motion pic-

tures by the industry to those the content of which is acceptable to the Committee.

8. Plaintiff has been damaged in the sum of $1,000,000 for loss of opportunity of employment in the industry and deprivation of artistic and intellectual gratification flowing therefrom and the resulting humiliation and anguish; in the sum of $250.000 for the jeopardizing of employment opportunities in other industries because of the necessity of disclosing the reasons for his inability to obtain employment in the industry; and in the sum of $1,000,000 as punitive damages.

The allegations in respect to the appearance of all but five of the plaintiffs before the Committee are, save for dates, identical. In each instance the appearance before the Committee was after the alleged making of the agreement. As to the five who did not appear, the averments are that each was named as a Communist by a witness appearing before the Committee; that each refused to appear before the Committee to answer questions concerning his or her "political affiliations, beliefs and associations," basing such refusal on his or her constitutional rights including the privilege against [195] self-incrimination; as a result of the acts of and pursuant to the agreement, they have been refused and excluded from employment in the industry by defendants and all other employers therein; and they will henceforth find it impossible to obtain such employment. In each instance the refusal to appear was after the making of the alleged agreement.

The prayer is for money damages of $2,250,000 on each count and for an injunction.

The amended complaint is to be implemented by the facts of which we take judicial notice. In considering

a demurrer to a complaint, facts judicially noticed are deemed a part of the complaint even when the pleading contains an express allegation to the contrary.[2] We take judicial notice of the proceedings and reports of the Committee on Un-American Activities.[3] The proceedings and reports of the Committee show that each of 18 of the 23 plaintiffs was asked by the Committee whether he or she was then or ever had been a member of the Communist Party. Each refused to answer, asserting his or her constitutional privilege against self-incrimination. Each of the other 5 plaintiffs was stated to be a Communist by a witness before the Committee and on the same grounds refused to appear and state whether he was then or ever had been a member of the Communist Party. The refusals occurred in the course of hearings held as part of a Congressional investigation by the Committee on Un-American Activities of the House of Representatives acting within the scope of its

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[2]*Chavez v. Times-Mirror Co.*, 185 Cal. 20, 23; *Loranger v. Nadeau*, 215 Cal. 362, 365; *Hammell v. Britton*, 19 Cal. 2d 72, 75; *Weil v. Barthel*, 45 Cal. 2d 835, 837.

[3]Code Civ. Proc., sec. 1875(3); *Arizona v. California*, 283 U. S. 425, 75 L. Ed. 1154, 51 S. Ct. 522 Footnote 4; *Greeson v. Imperial Irr. Dist.*, 9 Cir., 59 F. 2d 529, 531; *Louisville Gas & Electric Co. v. Federal Power Com'n.*, 6 Cir., 129 F. 2d 126, 134, cert. den. 318 U. S. 761, 87 L. Ed. 1133, 63 S. Ct. 559; *Overfield v. Pennroad Corporation*, 3 Cir., 146 F. 2d 889, 898; *Stasiukevich v. Nicolls*, 1 Cir., 168 F. 2d 474, 479; *Osage Nation of Indians v. United States*, 97 F. Supp. 381, 403, cert. den. 342 U. S. 896, 96 L. Ed. 672, 72 S. Ct. 320; *Rank v. Krug*, 90 F. Supp. 773, 781; *United States v. Aluminum Co. of America*, 1 F. R. D. 71; *Mullan v. State*, 114 Cal. 578, 582; *Davis v. Whidden*, 117 Cal. 618, 623; *French v. Senate of State of California*, 146 Cal. 604, 608; *Pacific Employers Ins. Co. v. Carpenter*, 10 Cal. App. 2d 592, 602. *Cf. Parker v. James Granger, Inc.*, 4 Cal. 2d 668, 677, cert. den. 298 U. S. 644, 80 L. Ed. 1375, 56 S. Ct. 943; *Arnold v. Universal Oil Land Co.*, 45 Cal. App. 2d 522, 529; *El Zarape etc. Factory v. Plant Food Corp.*, 90 Cal. App. 2d 336, 346.

authority into Communist in [196] filtration of the motion picture industry,[4] for the protection of the internal security of this Nation and the public disclosure of the forces that menace the United States. It thus appears, contrary to the allegations of the complaint, that the questions which the 18 plaintiffs refused to answer and that the statements which the 5 refused to appear and give had nothing whatever to do with their political affiliations, associations, or beliefs but concerned their membership in a "conspiratorial and revolutionary junta"[5] one of whose objectives is the overthrow of our government by force and violence,[6] a malignant force which

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[4]Act of August 2, 1946, c. 753, Title I, Pt. 2, sec. 121(q), 60 Stat. 828; Senate Doc. No. 26, 80th Congress, 1st Session; *Dennis v. United States*, App. D. C., 171 F. 2d 986, 987-8, aff. 339 U. S. 162, 94 L. Ed. 734, 70 S. Ct. 519; *Lawson v. United States*, App. D. C., 176 F. 2d 49, 51-2, cert. den. 339 U. S. 934, 94 L. Ed. 1352, 70 S. Ct. 663; *Barsky v. United States*, App. D. C., 167 F. 2d 241, 250, cert. den. 334 U. S. 843, 92 L. Ed. 1767, 68 S. Ct. 1511.

[5]Concurring opinion of Mr. Justice Jackson, *American Communications Assoc. v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 764.

[6]*Menace of Communism*, Senate Doc. No. 26, 80th Congress, 1st Session; *Report on the Communist Party of the United States as an Advocate of Overthrow of Government by Force and Violence*, House Report No. 1920, 80th Congress, 2d Session; House Doc. No. 251, 83rd Congress, 2d Session, 100 Congressional Record 80; *Communism in Action*, House Doc. No. 754, 79th Congress, 2d Session; Labor Management Relations Act, 1947, Sec. 1 *et seq.*, 29 U. S. C. A. Supp. sec. 159(h), *American Communications Asso. v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 764; Internal Security Act of 1950, sec. 1 *et seq.*, 50 U. S. C. A. sec. 781 *et seq.*; Communist Control Act of 1954, Sec. 1 *et seq.*, 50 U. S. C. A. Supp. sec. 841 *et seq.*; Government Code, sec. 1027.5; *National L. R. Bd. v. Highland Park Mfg. Co.*, 341 U. S. 322, 95 L. Ed. 969, 71 S. Ct. 758; concurring opinion of Mr. Justice Jackson in *Dennis v. United States*, 341 U. S. 494, 564-5, 95 L. Ed. 1137, 1181, 71 S. Ct. 857; *Galvan v. Press*, 347 U. S. 522, 529, 98 L. Ed. 911, 74 S. Ct. 737; *Rosenberg v. United States*, 2 Cir., 195 F. 2d 583, cert. den. 344 U. S. 838, 97 L. Ed. 652, 73 S. Ct. 20; *National Maritime Union of America v. Herzog*, 78 F. Supp. 146, aff. 334 U. S. 854, 92 L. Ed. 1776, 68 S. Ct. 1529; *Lawson v. United States*,

menaces the very existence of the government. It also necessarily appears, contrary to allegations of the complaint, that the purpose of the agreement was not to limit, or control, or direct the political activities of defendants' employees or to coerce them from following any course of political action or to limit employment in the industry to those persons whose political beliefs are acceptable to the Committee. Nor was the investigation into the political beliefs of anyone. The allegations of the complaint in these respects are misleading and evasive. The word "political" implies "orderly conduct of [197] government, not revolution." (*Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 485.)

App. D. C., 176 F. 2d 49, cert. den. 339 U. S. 934, 94 L. Ed. 1352, 70 S. Ct. 663; *United States v. Dennis*, 2 Cir., 183 F. 2d 201, 212-3, aff. 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857; *Barsky v. United States*, App. D. C., 167 F. 2d 241, 247, cert. den. 334 U. S. 843, 92 L. Ed. 1767, 68 S. Ct. 1511; *Daniman v. Board of Education*, 306 N. Y. 532, 540-1, 119 N. E. 2d 373, 379; *People v. Chambers*, 22 Cal. App. 2d 687, 709-13; 37 Georgetown L. J. 297. Said Judge Learned Hand in *United States v. Dennis, supra*, (183 F. 2d 212): "The American Communist Party, of which the defendants are the controlling spirits, is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. That article, which is a common-place among initiates, is a part of the homiletics for novitiates, although, so far as conveniently it can be, it is covered by an innocent terminology, designed to prevent its disclosure. Our democracy, like any other, must meet that faith and that creed on the merits, or it will perish; and we must not flinch at the challenge."

The Case Against the Motion Picture Producers and Distributors

The complaint sounds in tort. To state a cause of action facts must be alleged showing that some legally protected interest of plaintiffs has been injured. (*MacLeod v. Fox West Coast T. Corp.*, 10 Cal. 2d 383, 386; *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 195.) The complaint does not allege any present or existing contract or employment of any one of plaintiffs. The cause of action attempted to be alleged is obviously one for wrongful interference with future or prospective contract or business relations. In effect it is alleged the motion picture producers and distributors combined and agreed to make it a condition of employment in the motion picture industry that the person shall not have been subpoenaed as a witness before the Committee and have refused on constitutional grounds to answer, not questions concerning hs political affiliations, activities, or beliefs, but whether he is or ever has been a member of the Communist Party, or that the person was named before the Committee as a Communist and had refused on constitutional grounds to appear before the Committee to answer questions concerning his Communist affiliations, beliefs, and associations. The specific injury of which plaintiffs complain is the loss or prevention of future or prospective employment in the motion picture industry. To state facts sufficient to constitute a cause of action for such loss or prevention of employment, it must be [198] averred that at the time of the alleged tort there was a certain or definite prospect that plaintiffs would obtain it.

The general rule is that before recovery can be had for interference with the loss of a future or prospective

contract or business relationship, it must appear that such contract or relationship would otherwise have been entered into. (Cases collected 9 A. L. R. 2d 228, 256-7.) In *Campbell v. Rayburn*, 129 Cal. App. 2d 232, the complaint alleged: the plaintiff wrote a letter to the attorney general describing gambling activities in Riverside County; the attorney general advised the plaintiff that the letter had been forwarded to the defendant sheriff of Riverside County for attention and appropriate action; the defendant sheriff induced or otherwise caused two named gamblers who owned property in Palm Springs not to rent the plaintiff office space for the purpose of carrying on his business as a real estate broker; one of the named gamblers told the plaintiff he would not "give the plaintiff standing room"; and this same gambler had influenced his friends not to rent office space to the plaintiff, thus forcing him to conduct his business from his home. Demurrer was sustained without leave. Saying there was an attempt to state a cause of action for alleged wrongful interference with prospective contractual relations, the court on review held (p. 234):

> "[N]o facts are alleged with respect to whether such accommodations would otherwise have been available on terms satisfactory to the plaintiff, the availability or lack of accommodations other than those referred to, or facts showing that the plaintiff had any reasonable expectation of economic advantage which would otherwise have accrued to him, and no facts are alleged tending to show the nature or amount of any damage to the plaintiff.
>
> "The general principles applicable here have been applied in decisions in other states."

The court then quoted with approval from *Goldman v. Feinberg*, 130 Conn. 671, 37 A. 2d 355; *Union Car Ad-*

vertising Co. v. Collier, 263 N. Y. 386, 189 N. E. 463, and *Debnam v. Simonson*, 124 Md. 354, 92 A. 782. The judgment was affirmed.

In *Goldman v. Feinberg*, 130 Conn. 671, 37 A. 2d 355, quoted from in the Campbell case, one of the defendants requested the plaintiff, a real estate broker, to show him some houses which were for sale. The plaintiff did so over a period of 7 months but to no avail. Among the homes was one which the plaintiff saw on a public listing issued by a bank, [199] the list price for which was stated to be the irreducible minimum. At the defendant's request the plaintiff inquired of the bank if the price could be lowered and was told it could not. He did not inform the bank he was negotiating with the defendant. Later the bank sold the house to the defendant and paid the latter's father (also a defendant) a commission. The father had been present when the plaintiff showed the house to the son. The plaintiff's theory was that the defendants had conspired fraudulently to represent to the bank that the father was the procuring broker, thus depriving the plaintiff of a commission he would otherwise have been able to earn. The question as stated by the court was "whether the plaintiff, in order to make out a cause of action, must prove that he would have made a profit except for the unlawful interference with business relations is recognized not only in respect to existing contracts but also as to one's right to pursue his lawful occupation or business and concluded (37 A. 2d 356):

> "It does not follow from this, however, that a plaintiff may recover for an interference with a mere possibility of his making a profit. On the contrary, wherever such a cause of action as this is recognized, it is held that the tort is not complete unless there

> has been actual damage suffered. Pollock, Torts, 14th Ed., p. 441; Winfield, Law of Tort, 2d Ed., p. 643; Prosser, Torts, p. 1016 *et seq.* To put the same thing in another way, it is essential to a cause of action for unlawful interference with business that it appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit. [Citations.] In Lewis v. Bloede, *supra,* the Circuit Court of Appeals says (202 Fed. at p. 17): 'When the parties have entered into a contract, the terms of which are fixed, the plaintiff is only required to show the malicious interference and the damage proximately resulting; whereas, if the ground of complaint is that he was about to make a contract, he is required to go further and show that he was not only "about to," but would, but for the malicious interference of the defendants, have entered into the contract.'"

In *Union Car Advertising Co. v. Collier,* 263 N. Y. 386, 189 N. E. 463, also quoted from in the Campbell case, the plaintiff was one of two bidders on a proposal to lease advertising space in the cars and platforms of an elevated railway. The [200] plaintiff's bid offered the higher rental of the two. The negotiations with the lower bidder and proceeded to a point which made it likely, if not certain, that the plaintiff would get the contract on which it was bidding. The railway company awarded the contract to the defendants after changes in terms, on which the plaintiff had not been given an opportunity to make a proposal. The plaintiff's contention was that the result came about from the defendants' wrongful interference. The interference consisted of misrepresentations as to the plaintiff's business ability and

financial integrity; the bringing of political and economic pressure on the railway's trustees; and the defendants' indemnification of the railway from loss resulting from lawsuits arising out of rejection of the plaintiff's bid. The jury was instructed that the plaintiff could recover if the defendants' acts had prevented the railway company "from entering with him into a contract which it is reasonably certain would have been made but for such interference." The judgment was for the plaintiff. Reversing, the Court of Appeals said (189 N. E. 469):

> "[Referring to the quoted instruction] If these words mean anything less than 'would have received,' we think they go too far. A cause of action exists where an executed contract is broken by a third person's unlawful interference. [Citation.] A cause of action has also been recognized where a party *would* have received a contract but for the malicious, fraudulent, and deceitful acts of a third party, such, for instance, as materially lying about him. [Citations.] There must be some certainty that the plaintiff would have gotten the contract but for the fraud. This cannot be left to surmise or speculation. The courts rightfully extended the arm of the law to reach one who deliberately interfered with an executed contract [citation], since which time they have gone a step further and mulcted in damages him who does the same thing to one who *would* have received such a contract but for the illegal interference. [Citations.] The courts will be a little slow in permitting juries to speculate upon what a competitor had reason to expect or might reasonably suppose would happen. The expressions 'reasonable expectation' or 'reasonably certain' may not be as precise as '*would* have received,' and we think the latter words are preferable."

In *Debnam v. Simonson,* 124 Md. 354, 92 A. 782, also quoted from in the Campbell case and cited with approval in *Imperial Ice Co. v. Rossier,* 18 Cal. 2d 33, 36, the plaintiff devised a plan to buy certain land and build an apartment building thereon. He disclosed his project [201] in confidence to one of the defendants who was an architect and entered into a contract with the latter to prepare the plans and specifications. He also entered into contracts for labor, materials, and financing, and was about to enter into a contract for the land. At that time the defendants, conspiring together, acquired the land for themselves, thus preventing the plaintiff from consumating his proposed purchase and also preventing his performance of the other contracts into which he had entered. A demurrer to the complaint was sustained. The Maryland Court of Appeals held (92 A. 783):

> "The mere fact that the plaintiff has suffered damage or has lost an opportunity to profit financially because of his failure to consummate his plans owing to the purchase of said lot of land by the defendants does not in itself give him the right of recovery from the defendants for the damage sustained by him. The act must be of such a character as to create an actionable wrong before the right of recovery against the defendants exists, and, to create an actionable wrong, the legal rights of the plaintiff must in some way be invaded. There must be a violation of a legal right committed knowingly to create a cause of action. . . .
>
> "[92 A. 784.] [T]his declaration is also defective because it does not allege with sufficient clearness, if at all, that, but for the alleged interference of the defendants, the plaintiff would have become the purchaser of the property, and would have suc-

ceeded in consummating his alleged contemplated plans or project. Such an allegation is necessary. Before he can recover it must be shown that, but for that interference, the purchase would have been made and his plans consummated."[7]

The complaint in the case at bar is devoid of any allegation of fact that any contract or relationship would have been entered into between any one of plaintiffs and any one of defendant motion picture producers and distributors or with anyone in the motion picture industry but for the alleged agreement. There is no factual showing of denial of employment. There is no allegation that at the time the agreement was made, or at any time, thereafter, any one of plaintiffs was an employee of any one of the defendants or had any reasonable prospect of becoming such; or that any one of them was, or is, or had any prospect of being a producer of motion pictures. There is not even an allegation that there were any negotiations pending or in progress between any one of plaintiffs and any one of defendants or with anyone in the industry, or that any plaintiff was seeking employment in the industry at the time of the alleged tortious interference. There is no allegation that at any time after the making of the agreement any one of plaintiffs requested employment from any one of defendants or from anyone in the motion picture industry. It is not alleged that, but for defendants' alleged interference any one of plaintiffs would, or even probably or possibly would, have

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[7]And see *Hundley v. Louisville & N. R. Co.*, 105 Ky. 162, 48 S. W. 429, 431, 63 L. R. A. 289, 88 A. S. R. 298; *Bailey v. Hans Watts Realty Co.*, 113 W. Va. 739, 169 S. E. 404; *Celli & Del Papa v. Galveston Brewing Co.*, (Tex.) 227 S. W. 941, 943; *Payne v. Gebhard*, (Tex. Civ. App.) 136 S. W. 1118, 1120; *Harnick v. Avrum Realty Corp.*, 248 App. Div. 385, 288 N. Y. S. 256.

been employed in the industry. At the oral argument counsel for plaintiffs conceded it was not alleged "that individual plaintiffs did apply for work and were denied the right to work."

So far as appears, the last efforts of plaintiffs to obtain employment may have occurred years before the agreement. All that is alleged is that at some unspecified time prior to the agreement, they had been so employed. When and why that employment was terminated is not alleged. Since the employment terminated some time before the agreement, in the absence of contrary allegation the inference necessarily is that the termination was the result of facts wholly disconnected from the agreement and that those facts, whatever they may have been, still are effective. It cannot be inferred from the alleged facts that at some unspecified time prior to the agreement plaintiffs were employed in the motion picture industry, they have not obtained employment since they invoked their constitutional privilege solely because of that fact.

There is an entire absence of factual allegation showing that any legally protected interest of plaintiffs has been interfered with. Neither an existing nor a prospective contract or business relationship is alleged. And there is nothing in the pleading from which it may be inferred that any prospective contract or business relationship has been interfered with by any wrongful act of defendants. The most that is alleged is a hope or expectation of em-

ployment. The complaint does not state facts sufficient to constitute a cause of action.

Bigelow v. RKO Radio Pictures, 327 U. S. 251, 90 L. Ed. 652, 66 S. Ct. 574, and *Speegle v. Board of Fire Underwriters,* 29 Cal. 2d 34, cited by plaintiffs, are not apposite. In Bigelow, a suit for an injunction and damages for violation of the Sherman and Clayton Acts, the sole ques [203] tion was, as stated by the court, "whether the evidence of damage [was] sufficient to support the verdict" for plaintiff. In Speegle the complaint alleged interference with existing contracts.

Plaintiffs argue they should have been permitted to amend. One of the grounds of defendants' demurrer to the original complaint was that no cause of action was stated because of the absence of any allegation to the effect that an existing or prospective contract or business relationship had been interfered with.[8] The demurrer

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[8]In points and authorities filed in support of their demurrer to the original complaint, defendants said: "The complaint does not state facts sufficient to constitute a cause of action for interference with business relations. No existing contract between plaintiffs and any of the defendants is alleged. Consequently, there must be shown a reasonable probability that, but for the alleged interference, business relations between the parties would have been entered into. It is not enough that plaintiffs hoped or even expected that such relations might eventuate, the fact that they would have eventuated must appear.

"Before recovery can be had for interference with and loss of a prospective business relationship or contract, it is held that 'it must appear that such relationship or contract would otherwise have been entered into.'

"*Annotation,* 9 A. L. R. 2d 256-257, and cases there cited."

was sustained with leave. Plaintiffs then filed the complaint now before us. Plaintiffs amended only perfunctorily. For all practical purposes the original and the amended complaint are identical. No curative effort at all was exerted though opportunity was given. We must assume that plaintiffs have stated their cases as strongly as it was possible for them to do. (*Faulkner v. Cal. Toll Bridge Authority*, 40 Cal. 2d 317, 328.) Having declined to avail themselves of leave to amend in the particular which defendants specifically pointed out to them, plaintiffs must "stand upon their pleading as against all grounds and if the complaint is objectionable upon any ground the judgment of dismissal must be affirmed. [Citations.] Upon appeal from a judgment rendered after refusal to amend a complaint to which a demurrer has been sustained, it must be presumed that the pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and uncertainties must be resolved against him." (*Metzenbaum v. Metzenbaum*, 86 Cal. App. 2d 750, 752.) Plaintiffs evidenced their satisfaction with the pleading and their willingness to stand or fall on it in its present form. The court did not err in sustaining the demurrer of the motion picture producers and distributors without leave to amend. [204]

In view of our conclusion, we do not reach other points argued by counsel.

The Case Against the Members of the Committee and the Investigator

The demurrers of these defendants were sustained with leave to amend. Plaintiffs declined to amend. As the complaint stands, it alleges these defendants entered into the agreement. For the reasons stated in considering the complaint as against the other defendants, it does not state facts sufficient to constitute a cause of action against the members of the Committee or the investigator. The complaint avers that with respect to all matters alleged these defendants "acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities." These defendants argue they cannot be sued for the same acts both in their official capacities and in their personal capacities. In view of what we have said it is unnecessary to decide the point.[9]

The judgments are affirmed. [205]

VALLÉE, *J.*

We Concur.

SHINN, *P. J.*

WOOD, *J.*

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[9]See *Laughlin v. Rosenman*, App. D. C., 163 F. 2d 838, 843; *Cooper v. O'Connor*, App. D. C., 107 F. 2d 207, 210; *Reed v. Molony*, 38 Cal. App. 2d 405, 411; 67 C. J. S. 417, Sec. 125.

APPENDIX B.

Opinion of the Superior Court.

In the Superior Court of the State of California in and for the County of Los Angeles.

Michael Wilson, *et al.*, Plaintiffs, vs. Loew's Incorporated, *et al.*, Defendants. No. 610835.

MEMORANDUM RULINGS

This cause requires consideration of an alleged agreement not to employ plaintiffs in the motion picture industry, an alleged inducement of that agreement, the nature of the privilege to refuse to answer questions on the ground of self-incrimination and alleged refusals, on that ground, to appear before a congressional committee.

The amended complaint principally differs from the original, to which demurrers were sustained, in that the words "conspiracy" and "blacklisting" have been eliminated and the word "maliciously" has been added. Forty-one of the forty-four pages are the same mimeographed pages with here and there the above words penciled out.

In considering the several questions it will be convenient to divide the plaintiffs into two classes, those, eighteen in number, who appeared before the committee on un-American activities of the United States House of Representatives and refused to answer "certain questions" as to their activities and affiliations on the ground that the answers would tend to incriminate themselves and those, five in number, as to whom it is alleged they had been named as communists by previous witnesses and refused to appear before the committee upon the ground of self-incrimination. Likewise, it will be convenient to consider the defendants in two groups, those who are alleged to

be motion picture producers and distributors and the three, two of whom are members of and the third an investigator for the congressional committee.

The plaintiffs have not alleged the existence of any contract with any defendant or third person or attempted any conventional allegations of restraint of trade. The cause of action attempted on behalf of each plaintiff has been based upon an agreement, and the inducement thereof, to refuse employment in the motion picture industry to all persons who: (1) are subpoenaed as witnesses before said un-American activities committee and refuse to answer questions as to their affiliations, associations and beliefs upon the ground that their answers would incriminate themselves, or (2) are so subpoenaed and fail or refuse to appear.

The first question which will be considered is whether the amended complaint states facts sufficient to constitute a cause of action for damages or an injunction against the larger class of defendants, those who are alleged to be motion picture producers and distributors.

The gist of the causes of action attempted against these defendants is not found in any California statute or judicial decision. Its genesis would appear to be section 765 of the Restatement of Torts: "(1) Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable for that harm, even though they would not be liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances."

The above section, apparently, has not been referred to in any judicial decision in this or any other state although there are decisions which approach the field.

Consideration has led to the acceptance of the proposed rule although there are cogent arguments which might be presented against its acceptance.

The tort described in the section does not consist alone of the agreement not to enter into business relations, the proposed rule is that liability exists "if their concerted refusal is not justified under the circumstances." Lack of justification is a part of the tort, not merely a matter of defense. This conclusion rests upon three separate premises: (1) The statement of the rule itself, (2) the fact that it is an exception to the broader rule of non-liability stated in section 762 of the restatement and (3) by analogy to the holding in *Speegle v. Board of Fire Underwriters*, 29 Cal (2) 34.

In the Speegle case, decided on demurrer, the alleged tort was of greater degree, interference with existing contractual relationships, but the following language (pp. 40-41) is pertinent: "Collective bargaining . . . is carried on in recognition of the fact that employers as well as employees may organize for the purpose of furthering their common interests and that such organizations may bring pressure upon their members to include in their contracts certain terms and conditions or to terminate contracts that do not contain such terms and conditions . . . . Defendants' activities would be for an unlawful purpose, however, and would not be justified, if their objective was to stifle competition by enforcing a scheme to restrain trade (Rest. Torts, sec. 768 (c).) The answer to the question whether defendants are liable for interference with plaintiff's contractual relations therefore depends upon whether plaintiff has stated a good cause of action against defendants for injury to his business by activities in restraint of trade. Has plaintiff

properly raised in his pleadings the question of defendants' liability for restraint of trade?"

In the present case the question is, have plaintiffs properly raised in their pleadings the question of defendants' liability for a concerted refusal without justification under the circumstances?

The answer requires a consideration of the privilege to refuse self-incrimination, the scope of the fifth amendment to the Constitution and the privilege as embodied in the California constitution and laws.

The history of the privilege to refuse to answer a question on the ground that the answer would tend to incriminate the witness has been set forth in *Twining v. New Jersey*, 211 U. S. 78; 53 L. Ed. 97 and in greater detail in Wigmore on Evidence, section 2251. Briefly, it may be stated that it was unknown at the time of Magna Carta; it was not mentioned in the Petition of Rights (1629), the Bill of Rights (1689), by our Continental Congress or in the original draft of the Constitution. It developed as a rule of evidence in the English law courts during a period of their conflict with the ecclesiastical courts, wherein the privilege was unknown. It is not improbable that its origin was influenced by those jurisdictional rivalries, for it was not an age marked by concern for those charged with crime or called as witnesses. (Later writers base it upon the morality of the judicial process.) The English bankruptcy courts have not granted it to a bankrupt even if criminal charges were pending against him. It is peculiar to the British Isles and those countries which have taken the common law thence. It was incorporated in some early American state constitutions and into the fifth amendment to the

Constitution on the insistence of only four of the original thirteen states.

Exemption from self-incrimination is not a part of due process of law or a privilege or immunity of national citizenship. In the leading case of *Twining v. New Jersey, supra,* it was held: "Even if the historical meaning of due process and the decisions of this court did not exclude it, it would be going far to rate it as an immutable possession of every citizen of a free government. . . . The wisdom of the exemption has never been universally assented to since the days of Bentham, many doubt it today and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient."

As recently as *Adamson v. California,* 332 U. S. 46, 91 L. Ed. 1903, it was held (p. 53):

> "We reaffirm the conclusion of the Twining and Palko cases that protection against self-incrimination is not a privilege or immunity of national citizenship." (*cf. Louisiana v. Resweber,* 329 U. S. 459; *Brock v. North Carolina,* 344 U. S. 324.)

It has frequently been contended, in the above and other cases, that some state action or authorized procedure impaired the protection against self-incrimination afforded by the fifth amendment to the Constitution. The Supreme Court of the United States has consistently held that said fifth amendment is "restrictive only of national action". It has held that the states are free to grant or withhold the privilege against self-incrimination (*cf.* concurring opinion of Mr. Justice Frankfurter in *Louisiana v. Resweber, supra*), that they might adopt the civil law (*Holden v. Harby,* 169 U. S. 387; *Maxwell v. Dow,*

176 U. S. 581) wherein self-incrimination is compelled (*Twining v. New Jersey, supra*).

It is necessary therefore to turn to the law of California to measure the right asserted by the plaintiffs herein, for the fifth amendment extended no farther than to prevent the congressional committee from compelling plaintiffs to answer questions if the answers tended to incriminate plaintiffs. It is necessary to turn to the law of California to evaluate plaintiffs' rights for another reason. Plaintiffs contend that the alleged agreement among these defendants prevents plaintiffs from pursuing their several callings in the motion picture industry. Ever since the Slaughterhouse cases (16 Wall 36; 21 L. Ed. 394) it has been held that the right to engage in a trade, business or calling is not a privilege or immunity of national citizenship, but of state citizenship (*Twining v. New Jersey, supra*).

The privilege afforded by California relative to self-incrimination is to be found in the following words of section thirteen of article one of our constitution: "No person shall . . . be compelled, in any criminal case, to be a witness against himself; but in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury . . ."

The first portion of the above quotation antedates 1934, at which time the second portion was adopted. Prior to 1934 it had been settled that the words "in any criminal case" were not limited to their ordinary meaning, but also included civil actions, grand jury and legis-

lative committee hearings. The use of identical words in the 1934 amendment must be given the same interpretation. The privilege granted and its burden are co-extensive.

In a California criminal prosecution the defendant's failure to deny or explain by his testimony evidence or facts against him leads to the result "that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable" (*People v. Adamson*, 37 Cal. 2d 478; aff. 332 U. S. 46).

No reason occurs why comment and consideration by counsel, court and jury should be permissible in the forum of criminal prosecutions, but a concert of conduct in the forum of business enjoined. If the court or jury may draw unfavorable inferences in a criminal prosecution, no reason occurs why those who merely are possible employers should be required to respond in damages for conduct to protect their business interests from the result of such inferences being drawn by their customers.

The authors of section 765 themselves state in their discussion of section 762 the necessity that each business enterprise must be free to select its own relations in its own interests, a part of the liberty of every person to acquire property, engage in business and select which business transactions he shall enter. Section 765 they propose as an exception to the rule of non-liability, as a limitation upon the foregoing freedom, in so far as the concert of refusal affects the economic welfare.

The economic welfare does not require enjoining possible employers from agreeing among themselves that they will not employ persons who refuse to answer ques-

tions as to their activities, affiliations and associations in the course of investigations relative to communistic activities in this country. Nor was the privilege against self-incrimination originated or continued for the protection of the economic interests of those who exercise it. No witness may refuse to answer a question because it will affect his economic interests adversely. The exemption is available only if the answer will tend to show conduct for which the witness may be prosecuted and convicted (*cf. Ex parte* Cohn, 104 Cal. 524).

Another standard of evaluation in determining whether the agreement alleged to have been made by defendants was not justified under the circumstances is to be found in previous rulings in this court that complaints for the termination of school teachers who similarly refused to answer questions, notwithstanding school district rules requiring answers and authorizing termination proceedings for refusals, stated facts sufficient to constitute causes of action.

Further, it should be noted that section 1028.1 of the Government Code makes it the duty of every public employee to appear before any committee or sub-committee of the Congress or state legislature in this field and answer questions. The section further provides: "Any public employee who fails or refuses to appear or to answer under oath on any ground whatsoever any questions so propounded . . . . shall be suspended and dismissed from his employment in the manner provided by law." The section appears to be a valid legislative enactment.*

Plaintiffs are not concerned with possible employment in the public service, but it would be an anomalous result

if public employees were discharged for certain conduct and those not in public service could enjoin or recover damages from non-employers because the latter mutually agreed to refrain from employing persons who so acted. It would be strange law which found service of the public interest in the former instance, but an anathema in the latter merely because of the concert of action.

The foregoing considerations point toward a ruling that, as a matter of law, the agreement alleged was justified under the circumstances, but it is not necessary to go that far. It is necessary, as stated at the outset, that plaintiffs plead facts sufficient to show that the concert of agreement was not justified under the circumstances.

Plaintiffs have recognized that necessity, for in the complaint and amended complaint they have alleged purposes behind the said agreement. Paragraph seven of the amended complaint contains those allegations. The purposes alleged were to limit, control and direct plaintiffs' political activities; to coerce and influence them to refrain from adopting or following any course or line of political action or activity not acceptable to the committee on un-American activities, to limit employment of persons to those whose political beliefs are acceptable to said committee and the content of motion pictures to that which is acceptable to said committee. These allegations appear more inciting than substantial, more of a cliché than factual, and while considerable liberality should be allowed the pleader in stating facts by way of lack of justification "under the circumstances", it does not follow that any statement will suffice because it has been made. If the goal alleged cannot result, the allegation of purpose will not suffice.

The amended complaint alleged that defendants agreed to exclude from employment: (1) communists, (2) those who refused to appear and (3) those who declined to answer questions as to their activities, affiliations, associations and beliefs. These plaintiffs have not alleged that they are communists, they have alleged they appeared, hence the only allegations as to the agreement affecting them is the failure to answer. Merely giving answers as to activities, affiliations, associations or beliefs, past or then current, would not have limited, controlled or directed their political activities. Whatever their past conduct or beliefs, these could not be changed, limited, controlled or directed retroactively. Whatever their then current activities, associations or affiliations these could not then have been changed or directed by anyone except plaintiffs. Their activities could have been controlled and limited only if criminal and the law actually seeks to control and limit criminal activity, political or non-political. The allegations as to beliefs and influencing may be dropped from consideration. The holding of a belief cannot be externally controlled, directed or limited and could not in itself constitute a crime. Belief held, without overt acts, might be immaterial in an inquiry but it would not be within the privilege against self-incrimination. As to influencing plaintiffs' political activities, affiliations and associations the law does not look askance at such efforts and the concerted actions of political parties, clubs and candidates are devoted to that end.

How employment in the industry would be limited to those acceptable to the committee if plaintiffs had answered does not appear. To the attainment of that result we should have to presume further terms into the agree-

ment alleged and read into the amended complaint facts which have not been alleged.

The alleged purpose of limiting the content of motion pictures to matter acceptable to the committee cannot stand up under scrutiny. The amended complaint alleges these defendants controlled the industry, presumably plaintiffs did not, therefore the content of pictures would appear to have been determined by defendants prior, during and subsequent to the committee hearings and could not have been affected if plaintiffs had answered. Further, motion pictures are a product of private industry and the law is not concerned with whether the producers thereof desire to exclude content which is not acceptable to some race, creed or committee.

The amended complaint, as did the original, fails to allege unjustness under the circumstances.

When we turn to the second group of plaintiffs (counts 16, 19, 20, 21 and 22) we find certain additional allegations and the absence of one. The added allegations are that the particular plaintiff in each count had been named as a communist by previous witnesses before the committee and had refused to appear before the committee. The allegation missing is that the plaintiff had been subpoenaed to appear. In other words, each of the eighteen counts on behalf of plaintiffs who appeared alleges that the particular plaintiff was subpoenaed although the appearance renders the allegation surplusage, but these five counts are silent as to subpoenas. It is not unreasonable to assume that any absence of or defects in subpoenas would have been alleged in the amended complaint, if not the original. If plaintiffs had not been subpoenaed, they could not state causes of action founded

on the agreement, for it, as alleged, applies only to persons who appear or are subpoenaed and fail to appear.

The refusal or failure to appear is not an exercise of the privilege against self-incrimination, for that exemption has never given the witness the right to elect between appearance or non-appearance. The conduct of these defendants was not authorized by the fifth amendment to the Constitution or the laws of California.

The rule proposed in section 765 of the restatement rests upon an assumed economic value, namely, that while individuals may refuse to have business relations there may be instances in which a concert of refusal will not be tolerated because of the greater force and economic power of the concert of action. Mere concert of action is not condemned, because the law recognizes and upholds concerted effort in collective bargaining and other relationships.

No reason appears why refusals to appear before courts or legislative committees should be encouraged. No reason appears why the economic welfare requires that notwithstanding contemptuous conduct toward a summons from a governmental agency the concert of action of exclusion is a thing which must be enjoined or penalized by an award of damages. The prospect of contempt proceedings, not an award of damages or an injunction must remain the wages of such conduct.

As to each of these five plaintiffs the amended complaint alleges: "plaintiff . . . . was named as a Communist by a witness appearing before the said Committee on Un-American Activities . . ." The defendants herein and the public would be entitled to draw from the refusal to deny or explain this evidence, inferences which

were unfavorable. It would be unrealistic to say that the defendant employers who are dependent upon the public for the continuance of their businesses would not be "justified under the circumstances" in making an agreement not to employ this group of plaintiffs. Their economic interest is self-evident and not to be gainsaid by academic discussions.

This brings us to the second group of defendants, three in number, two of whom are members of the congressional committee and one an investigator for the committee.

Because the amended complaint is merely forty-one mimeographed pages found in the original with certain words pencilled out and three partially new pages, it actually alleges that these defendants entered into an agreement not to employ plaintiffs, allegations which plaintiffs probably did not intend. It is more probable that plaintiffs desire to stand on the allegations that these defendants induced the others to make the agreement.

No demurrer for failure to separately state causes of action was filed by these defendants only a general demurrer to the entire amended complaint.

The court must take cognizance of the probability of an absence of any economic interest in these defendants and consider the allegations to be of a purposeful interference by strangers with the possibility of business relationships.

Purposely causing another not to enter into business relationships with a third person has been recognized as a possible tort from very early times and in many varied situations. Such a tort was recognized as early

as the year 1410 and the common law developed a special writ in the field before the end of that century.

The earliest decisions were in cases which involved some violence, threat thereof, fraud or defamation, but the general doctrine has been broadened time and again to situations which do not contain these elements. Within the general field are trademark and trade name infringements, fraudulent misrepresentations, defamation of business and disparagement of goods.

Essential elements are the nature of the acts which constitute the inducement, for not every inducement rests upon tortious conduct; knowledge upon the part of the actor, for an inducement may be without knowledge and not tortious and the relationship of the parties, because that may authorize the conduct of the defendant. In other words, merely alleging that the defendants "induced" others not to enter into business relationships with the plaintiffs does not allege (1) tortious conduct, or (2) any act on the part of the defendants charged. Such allegation is a legal conclusion of the pleader. It gives the result of action, but fails to allege what was done. It is as descriptive of acts for which no liability attaches as it is of tortious conduct. The facts from which the pleader concludes that the defendant induced the refusal to enter into business relations may or may not warrant the recovery of damages. It may have been completed leaving nothing to enjoin or it may be continuing. The situation cannot be determined either way as a matter of law and plaintiffs should be given another opportunity to amend.

The twenty-three general demurrers (one to each count of the amended complaint) of each of the following de-

fendants, Loew's Incorporated, Paramount Pictures, Inc., Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc., Warner Brothers Pictures, Inc., Republic Productions, Inc., Hal E. Roach Studios, Inc., T.C.F. Film Corporation, Universal Pictures Company, Inc., Warner Bros. Pictures Distributing Corporation, United States Pictures, Inc., Sol Lesser Productions, Inc., Association of Motion Picture Producers, Inc., E. B. Mannix, Dore Schary, Harry M. Warner and Jack Warner are sustained without leave to amend.

The general demurrers of the defendants Donald L. Jackson, Clyde Doyle and William Wheeler to the amended complaint are sustained with thirty days to amend.

DATED: July 9, 1954.

Ellsworth Meyer
Judge

---

*Since the preparation of the foregoing opinion, it has been reported that the District Court of Appeal, Third District, has upheld the constitutionality of section 1028.1, Government Code, (Steinmetz v. ————) but the opinion, if written, is not at hand.

APPENDIX C.

Order of Supreme Court of State of California After Judgment by District Court of Appeal.

Order denying hearing after judgment by District Court of Appeal. 2nd District, Division 3, Civ. No. 20769, Civ. No. 21100.

In the Supreme Court of the State of California in Bank.

Wilson, *et al.*, Appellants, v. Loews Incorporated, *et al.*, Defendants; Association of Motion Picture Producers, Inc., *et al.*, Respondents.

Wilson, *et al.*, Appellants, v. Loew's Incorporated, *et al.*, Defendants; Doyle, *et al.*, Respondents.

Appellants' petition for hearing DENIED.

Carter, J. is of the opinion that the petition should be granted.

Gibson, *Chief Justice.*

Filed Aug. 8, 1956. William I. Sullivan, Clerk. By S. F. Deputy.

William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 12th day of Sept. A. D. 1956.

William I. Sullivan, By Crabtree, Deputy Clerk.
[Seal]

APPENDIX D.

Constitutional Provisions and Statutes Involved.

The pertinent provision of the Fourteenth Amendment reads as follows:

> ". . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent provision of the Fifth Amendment reads as follows:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

The pertinent provisions of Article VI of the Constitution read as follows:

> ". . . This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

* * * * * * * *

The pertinent provisions of the following statutes involved read as follows:

18 U. S. C. 241, June 25, 1948, C. 645, 62 Stat. 696.

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> . . .
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

* * * * * * * *

The pertinent provisions of 50 U. S. C. 783(f), Sept. 23, 1950, C. 1024, Title I, Section 4(f), 64 Stat. 991 are:

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. . . ."

* * * * * * * *

2 U. S. C. 192, as amended June 22, 1938, C. 594, 52 Stat. 942 reads:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any Committee of either House of Congress, willfully makes default or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

* * * * * * * *

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IN THE

Supreme Court of the United States

October Term, 1956

No. 333

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF.

ROBERT W. KENNY,
1557 Beverly Boulevard,
Los Angeles 26, California,
BEN MARGOLIS,
112 West Ninth Street,
Los Angeles 15, California,
Attorneys for Petitioners.

SAMUEL ROSENWEIN,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 552

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF.

In opposition to the petition for a writ of certiorari herein, respondents contend that the "constitutional question" was not seasonably raised; that the question was not necessary to a determination of the case; that if it was so necessary, the question was not substantial; and that no "state action" is involved. The position of petitioners is directly to the contrary.

I.

The Federal Question Was Seasonably Raised and Pursued on Appeal Through All the State Courts.

(a) The *only* property right which the complaint pleaded and with respect to which it requested relief was petitioners' right to pursue a calling. (Pet. pp. 4-7.) That the trial court had before it and considered whether a deprivation of *such a right* violated the Fourteenth

Amendment is apparent from its decision. The trial court stated: "Plaintiffs contend that the alleged agreement among these defendants prevent plaintiffs from pursuing their several callings in the motion picture industry." (Pet. App. p. 25.) The court held, contrary to respondents' contention, that petitioners had the standing to invoke this claim. (Pet. App. p. 22.) It held, however, that the respondents as a matter of law had been justified in their conduct. It stated that "exemption from self-incrimination is not a part of due process of law or a privilege or immunity of national citizenship." (Pet, App. p. 24.) The court stated that it had frequently been contended "that some state action or authorized procedure impaired the protection against self-incrimination afforded by the fifth Amendment to the Constitution" (Pet. App. p. 24), but it held that this court has consistently ruled that the Fifth Amendment is "restrictive only of national action." (Pet. App. p. 24.)

(b) Thus, the lower court, by its ruling, initially sanctioned the conduct of respondents and denied petitioners all remedy for the injury done them.

As respondents concede, in California practice, questions are raised on appeal in the briefs of the parties. (Resp. Br. p. 1, n. 1.)* Petitioners, following their appeals to the District Court of Appeal from the judgments of the Superior Court, filed their *Opening Brief.*

---

*Petitioners do not object, of course, to the filing of the supplemental record, and indeed welcome the inclusion of all the briefs on appeal. We had assumed that such briefs are not ordinarily a part of the record filed with the court. (Stern & Gressman, *Supreme Court Practice* (1954), p. 90), and that the pleading, the decisions of the courts below, together with the petitions for rehearing, and hearing in the Supreme Court, amply established that the federal question was always raised and necessarily determined.

After the statement of the Case, as this Court will observe, the Argument commences with the claim that the judgments of dismissal "deprived appellants of their liberties and properties without due process of law in violation of the due process provisions of the California Constitution, Article I, Section 13, and the Fourteenth Amendment to the United States Constitution." (Op. Br. p. 7.) We do not presume to summarize the entire argument in the Opening Brief, but on page 18, the discussion commences as follows: "By any scale of values, it cannot be denied that the right to earn a living ranks high in our constitutional system. (Cal. Const., Art. I, Secs. 1; 13; U. S. Const., Amend. 14.)" Then follows citations and quotations from decisions of this court in *Yick Wo v. Hopkins*, 118 U. S. 356; *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Allgeyer v. Louisiana*, 165 U. S. 578; *Truax v. Raich*, 239 U. S. 33; *Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, 268 U. S. 510; *Takahashi v. Fish. Comm'n.*, 334 U. S. 410.

The claim of deprivation of federal right in violation of the Constitution runs throughout the Opening Brief. On pages 23-24 of the Opening Brief, it is urged that the monopolistic combine arrogated governmental powers denied even to officials of government, with appropriate citations of decisions of this court. From pages 24-27, argument is devoted to establishing that the lower court was in error in asserting that the issue of due process was not involved in the case. "But it has never been held in California nor in the federal jurisdiction that a lawless invasion of the privilege against self-incrimination could never offend the fundamental requirements of due process nor deprive persons of those fundamental rights

secured to citizens by state and federal constitutions." (Op. Br. p. 27.) Then follows discussions of the governing federal statute (18 U. S. C., Sec. 241), (Op. Br. pp. 28-9), the recent decisions of this court on the privilege against self-incrimination (pp. 30-32), and discussions of the methods and objects of the monopolistic combine in the light of this court's decisions (pp. 34-41). There is a quotation from *Truax v. Corrigan*, 257 U. S. 312: "A State may not withdraw all protection against 'a wrongful and highly injurious invasion of property right.'" (Op. Br. p. 41.) It is added that "the denial of all relief to appellants constituted for all practical purposes the sanctioning of arbitrary lawlessness by State action in disregard of fundamental rights of liberty and property, all resulting in the deprivation of due process of law" (citing *Truax v. Corrigan, supra*) (Op. Br. p. 42). Protest is made at the "immunity granted to respondents by the court below" without trial (Op. Br. p. 21). In the light of all this, it is difficult to see how respondents can reasonably urge that the federal question was not seasonably raised below.

Respondents filed their answering brief. They urged, despite the ruling of the court below, that petitioners had not pleaded any existing contract or prospect of one, and therefore had no legally protected interest. They contended in any event that the complaint showed on its face that they were justified in all that they admittedly did. But on the issue here, we cull only one quotation from the lengthy brief: "A point is made by appellants of a constitutional 'right to work' and of the impairment of that right by the action of respondents. (Op. Br. pp. 18-21.) The cases cited in support are, with two exceptions to which we shall come in a moment, all concerned

with the constitutionality, under the Fifth and Fourteenth Amendments, of *government* action affecting one's opportunity to work. These amendments are a limitation on the power of government but not individuals." (Resp. Br. p. 62.) The whole of respondents' brief makes clear this recognition that the federal question was raised, briefed and argued before the District Court of Appeal.

Petitioners filed a reply brief. All the argument and citations of the Opening Brief were, of course, not repeated. Nevertheless, petitioners pointed out from the outset that respondents' argument on "lack of standing" basically misconceived the constitutional question in the case. Petitioners urged again and again that the suit was not for breach of a specific contract, or inducement of its breach, but "total exclusion from a chosen calling." (Reply Br. p. 22) To all that was stated in the Opening Brief, there were added additional quotations from the text writers (Reply Br. pp. 16-17) and citations from decisions of this court. (Reply Br. pp. 20-24.) The thread runs throughout the Reply Brief: "Respondents do not deny that the right to earn a living is a liberty protected by the Constitution. (App. Br. pp. 18-21.)" (Reply Br. p. 37.) See also, pages 38, 40, 41, 44, 58, 59, 60, 61, 62, 64, 65. The reply brief concludes with the following statement: "The judgments of the court below deprived appellants of their liberty and property without due process of law and the equal protection of the laws under both the state and federal Constitutions." (Reply Br. p. 68.)

(c) We do not understand the respondents to deny that the same federal question was duly raised in the petition for rehearing following the decision of the District Court of Appeal and in the petition for hearing to the

Supreme Court of California. [R. 175-188, 189-246.] It is submitted, therefore, that the federal claim and the grounds therefor were seasonably brought to the state courts' attention with precision. And "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67.

II.

The Federal Question Was Necessary to a Determination of the Case.

The question, which the respondents urge was not "seasonably raised," is not the federal question here. Respondents are referring to the specific ruling of the District Court of Appeal which respondents contend makes it inappropriate for this court to consider the actual federal question involved. In the petition for the writ of certiorari, we have endeavored to establish that the federal question covered the whole case, and that the rights of petitioners could not finally be determined without deciding the federal question; that the holding of the state court necessarily denied petitioners' claims under the Constitution; that the grounds of the denial were so interwoven with the federal question as not to be an independent matter or sufficiently broad to sustain the judgments without any decision of the federal question. (Pet. pp. 13-17.)

Petitioners also asserted that the specific grounds of the state court decision were invalid because in themselves they denied petitioners the equal protection of the laws and deprived them of liberty and property without due process of law under the Fourteenth Amendment.

(Pet. pp. 17-19.) Obivously a "non-federal ground" is inadequate if it is itself destructive of constitutional rights. This additional argument was addressed to this court solely to establish that jurisdiction is properly rested in this court to consider the federal question which was seasonably raised and constantly pursued in the state courts, and which the state courts necessarily decided in denying relief to petitioners.*

It cannot be denied that petitioners, whether they have a specific contract of employment or not, or a prospect of one, are now excluded permanently from employment in the motion picture industry.** If it is a violation of the Fourteenth Amendment for a State to deny any remedy for such concerted deprivation of the right to work, it is no less a violation because the state in denying all relief bases its denial solely on the failure to plead a specific contract.

---

*Even if the federal question were limited to petitioners' obligation to plead and prove a specific contract, the issue had been met in the briefs before the District Court of Appeal, as we have shown above. Moreover, the only decision relied on by the District Court of Appeal and by respondents, even now, is *Campbell v. Rayburn*, 129 Cal. App. 2d 232, patently distinguishable from the issue here and not accepted by the trial court. The ruling of the District Court of Appeal accepting respondents' contention, was therefore a surprise and unexpected, and the constitutional attack on the ruling would therefore be timely in any event. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673. But that limited ruling was not the federal question here. It was merely an inextricable part of the federal question which went to the whole of the case, and by its ruling the state court necessarily denied petitioners' federal claim.

**We discuss *infra* the arbitrary nature of the distinction between a "reasonable prospect of a contract", held to be entitled to protection, and the right to pursue callings by individuals who have had from five to twenty-five years experience in their professions and who have acquired reputations for excellence of work and high esteem in the industry, held entitled to no protection.

Of course, if respondents had not combined as they did; if petitioners had been permitted to negotiate unfettered with individual employers in the industry, then the existence of a specific contract or the prospect of one would have been significant in any claim of deprivation of the right to work. But when respondents draw a cordon around the industry and refuse petitioners the right to enter and negotiate for work admittedly because petitioners exercised a federal right, no specific contract or prospect of one can ever be shown. Thus, the denial by the state here of any remedy upon the specific ground of absence of contract necessarily decided that petitioners had no right to work in the industry at all and that the irremedial conditions set by the monopoly were properly imposed.

It is submitted, for all the aforesaid reasons, that the jurisdiction of this court to consider the claims of petitioners is clear. There is no doubt that the federal question was necessarily decided by the state courts below.

III.

The Federal Question Is Substantial.

We do not repeat the substantive arguments presented in the petition for writ of certiorari (Pet. pp. 22-33), most of which respondents have chosen to ignore. Petitioners submit that in fact respondents' abstract argument emphasizes the importance of the federal question.

(a) Respondents contend that this case involved a local matter on which the state is free to adopt any "socio-economic" policy it pleases free from all legal restrictions; that the state is free to make an unfettered choice between competing social and economic policies. (Br. pp. 11-16.)

The Constitution of the United States, however, sets limits upon the exercise of state powers. A state cannot adopt a policy of abridging peaceful picketing. *American Federation of Labor v. Swing*, 312 U. S. 321. It cannot deny the assistance of counsel in all criminal cases. *Powell v. Alabama*, 287 U. S. 45. It cannot sanction the denial of freedom of speech in a company town. *Marsh v. Alabama*, 326 U. S. 501. It cannot even adopt a policy of compelling children to engage in flag salute exercises. *West Va. State Board of Education v. Barnette*, 319 U. S. 624. The question in this case is whether, consistent with the equal protection and due process provisions of the Fourteenth Amendment, a state may deprive persons of their constitutional right to work solely because they exercised a privilege secured by the Fifth Amendment to the Constitution; whether all remedies can be denied by the state against a monopolistic combine which, by concerted agreement and unlawful methods, excludes persons from their chosen callings solely because of their exercise of a federal constitutional right. None of the cases cited by respondents deal with the deprivation of the constitutional right to work under the circumstances presented here.

(b) Respondents argue that there is here no denial of equal protection of the laws, that the classification is "based upon legitimate differences between the classes." Insofar as the respondents contend that it is reasonable to differentiate between those who are employed and those who seek to become employed, we have endeavored to show that so far as the constitutional right to work is concerned, there is no rational basis for such classification. (Pet. pp. 14-15, 17-19.)

But that is not the essential vice here. It is not denied that the state affords legal and equitable remedies for deprivation of the right to work. See, *James v. Marinship Corp.*, 25 C. 2d 721, 155 P. 2d 329; *Bautista v. Jones*, 25 C. 2d 746, 155 P. 2d 343. What has been done here is to carve out a class of persons in the state who are denied all remedies for deprivation of the freedom to work solely because such persons exercised a constitutional privilege in a federal forum. Such a classification is arbitrary and capricious because it cuts off the most fundamental freedom of all freedoms merely because of the exercise of another freedom guaranteed by the Constitution of the United States—without proof of wrongdoing or any other incapacity.

(c) Respondents state: "The right to work is not the right to work for any specific employer." (Br. p. 18.) This may be conceded. But that is not the issue here. It is the admitted monopolistic combine which has made it imposisble to seek work from any specific employer. The state here has refused, by its denial of all relief, to unlock the combination which is the essential evil. (Pet. p. 23.)

(d) Respondents state (Br. p. 19) that the privilege of the Fifth Amendment is secure against "encroachments by the states or even by the Federal government." It argues, however, that it is not secure against "private reactions", "social disfavor" or "economic disadvantage". That is not the issue here. A private employer may arguendo refuse to employ a person who has claimed the privilege of the Fifth Amendment, or may refuse employment for any reason. But here the state has sanctioned the agreement of the monopolistic combine and the deprivation of all right to pursue a calling because of the

exercise of a constitutional privilege. Here the monopoly has not given the private parties the opportunity to negotiate freely. "Private reactions" have not been tested, and the "economic disadvantage" comes not from the exercise of the constitutional privilege, but from the conduct of the monopoly sanctioned by the state.

IV.

The Denial by the State of All Relief From an Unlawful Deprivation of the Right to Work in the Instant Case Denied Petitioners the Equal Protection of the Laws and Deprived Them of Their Liberty and Property Without Due Process of Law Contrary to the Applicable Provisions of the Fourteenth Amendment.

The action of state courts and judicial officers in their official capacities is action of the state within the meaning of the Fourteenth Amendment. *Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673.*

In a variety of situations, this court held that a denial of equal protection of the laws by leaving a class of suitors remediless for highly injurious and wrongful injuries was action by the State, whether ultimately such action was or was not upheld by this court. The Fourteenth Amendment was at least intended that persons should have like access to the courts of the country for the protection of their person and property and the prevention and redress of wrongs. *Truax v. Corrigan,* 257 U. S. 312; *Truax v. Raich,* 239 U. S. 33; *Meyer v. Nebraska,* 262 U. S. 390.

---

*Respondents concede this, for they state: "We assume, when its constitutionality is called in question, that a rule or doctrine enunciated by a state court stands on the same footing as an act of the legislature." (Br. p. 13, n. 11.)

Here, the state has affirmatively created arbitrary, capricious and wholly irrational classifications. Persons who have a specific contract of employment are protected in their right to pursue a calling; those who have no such contract are totally without remedy, although the deprivation of the constitutional right to work by the wrongdoer is the same in each case. More than this: even if a person has only a reasonable prospect of a contract of employment, he is protected in his constitutional right, but if he is twenty-five years in the industry and has an excellent reputation and won high esteem (Pet. p. 4), such person is without all relief when seeking to pursue his chosen calling. Yet, a "reasonable prospect of a contract" may never eventuate into one, while a person with years of background and experience may more readily obtain a contract if he is permitted to follow his chosen calling. The line drawn by the state here is simply irrational.

Moreover, the courts of a state can act only "in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and . . . a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all remedy, is wholly at variance with those principles". *Truax v. Corrigan*, 257 U. S. 312, 329. The state here has sanctioned the exercise by the monopolistic combine, a non-governmental organization, of powers forbidden to Government itself. (Pet. p. 26.) It has sanctioned the exercise by the monopoly of these powers by wrongful methods and for unconstitutional ends. It has left without remedy persons deprived of their fundamental right to work by such admitted wrongdoer. Such action

by the state draws the due process provisions of the Fourteenth Amendment into play. See *Marsh v. Alabama*, 326 U. S. 501; *Terry v. Adams*, 345 U. S. 461.

Conclusion.

The jurisdiction of this court is properly invoked. The federal question is substantial and should be decided by this court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. KENNY,
BEN MARGOLIS,
Attorneys for Petitioners.

SAMUEL ROSENWEIN,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 39

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF FOR PETITIONERS

ROBERT W. KENNY,
1557 Beverly Boulevard,
Los Angeles 26, California,

BEN MARGOLIS,
112 West Ninth Street,
Los Angeles 15, California,
Attorneys for Petitioners.

SAMUEL ROSENWEIN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court of Appeal [R. 63] is reported at 142 Cal. App. 2d 183, 298 P. 2d 152. The opinion of the Superior Court [R. 44] is not reported. No written opinion was rendered by the Supreme Court of the State of California in denying the petition for hearing [R. 78].

Jurisdiction.

The judgments of the District Court of Appeal were made and entered on June 11, 1956 [R. 63]. A timely petition for rehearing was filed in the District Court of Appeal and denied on July 11, 1956 [R. 78]. A timely petition for hearing by the Supreme Court of the State

of California was filed and denied on August 8, 1956 [R. 78], Mr. Justice Carter being of the opinion that the petition should be granted. The petition for a writ of certiorari herein was duly filed on November 5, 1956, and was granted January 21, 1957 [R. 79], 352 U. S. 980. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Constitutional Provisions and Statutes Involved.

The pertinent text of the constitutional provisions and statutes involved are set forth in Appendix A, annexed to the brief herein.

Questions Presented.

The questions presented herein arise out of the sustaining without leave to amend of a demurrer to a complaint. The complaint alleges that a combination of respondent motion picture companies, exercising a monopoly of employment opportunities in that industry, together with certain members and an investigator (acting both in official and unofficial capacities) of the House Committee on Un-American Activities (hereinafter referred to as the Committee), by concerted agreement and conduct have excluded petitioners, who had long and successful professional careers in the motion picture industry, from all employment opportunities in that industry. The cause for such exclusion is that petitioners have either invoked their constitutional privileges and rights before the Committee or when named as Communists before that committee have failed voluntarily to appear and testify without invocation of their constitutional rights and privileges. The purpose of the agreement is to limit the political beliefs and activities of employees in the industry, and the content of motion pictures, to those acceptable to the

Committee. The Court below based its decision on the absence of an allegation in the complaint that petitioners had specific or prospective contracts of employment, holding that any individual who asserts his Fifth Amendment privilege may lawfully be excluded from all opportunity to pursue a calling if he does not have a specific contract of employment or the expectation of such a specific contract in the industry from which he is excluded. The questions presented under the aforesaid circumstances are:

1. Whether this Court has jurisdiction to review the judgments of the state court dismissing petitioners' complaint on respondents' demurrers.

2. Whether the judgments of the state court dismissing petitioners' complaint on respondents' demurrers as aforesaid was contrary to law and the supremacy clause of Article VI of the Constitution, deprived petitioners of their liberty and property without due process of law and denied petitioners the equal protection of the laws in violation of the equal protection and due process provisions of the Fourteenth Amendment.

Statement of the Case.

The complaint herein alleging the following facts was dismissed upon demurrers without leave to amend.

(a) Petitioners *are* by profession motion picture actors, actresses, writers, story editors, research workers and grips, respectively, having had from five to twenty-five years' experience in their professions, having acquired reputations for excellence of work in the motion picture industry and having won high esteem as such professional persons in the said industry, all of which was known to respondents [R. 2, 12, 38].

(b) The respondent motion picture producers and distributors [R. 29-34] between them control all motion picture production and distribution in the United States and all motion picture employment opportunities in the United States for all employees in the said industry [R. 34].

(c) With respect to the matters alleged in the complaint, the three remaining respondents acted both in their official capacity with relation to the Committee and individually in non-official capacities. Two of said respondents are members of and the third is an investigator employed by the Committee [R. 34].

(d) On and prior to March, 1951, and continuously thereafter, respondents and each of them agreed with each other as follows:

1. To refuse employment to and exclude from employment in the said industry all employees and persons seeking employment who were subpoenaed as witnesses before the Committee and who, relying on their rights and privileges under the Constitution, including the privilege against self-incrimination under the Fifth Amendment, refused to answer questions concerning their political affiliations, associations and beliefs.

2. To refuse employment to and exclude from employment all persons and employees who were named before said Committee as Communists and who failed to appear voluntarily before said House Committee to answer all inquiries without assertion of constitutional privileges.

3. To refuse employment to and exclude from employment all persons and employees who were subpoenaed to appear as witnesses before said Committee and who failed for any reason to appear and testify fully.

4. To refuse employment to and exclude from employment all persons and employees who were suspected of ever having been Communists or having any associations with Communists and who refused or failed voluntarily to appear before said Committee or its agents and waive and surrender their constitutional rights and privileges and testify or give statements fully disclosing their own political affiliations, associations and beliefs and those of their families, friends, associates and acquaintances [R. 35].

(e) Respondents and each of them maliciously and without justification undertook to and did induce and persuade each other, and other employers in the said industry, to desist and refrain from employing and to refuse employment to all such aforesaid persons and employees, with the intent to prevent such employees and other persons from having or obtaining employment in the said motion picture industry [R. 35].

(f) As a part of the aforesaid agreement, and as one of the means of effectuating it, all of the respondents have published and circulated and are now publishing and circulating throughout the entire industry a list containing the names of such employees and other persons with the direction and intent that they be not employed [R. 36].

(g) The purpose of the aforesaid agreement is as follows:

1. To limit, control and direct the political activities of respondents' employees.

2. To coerce and influence said employees through and by means of threat of discharge and loss of employment to refrain from adopting or following any

course or line of political action and activity not acceptable to the Committee.

3. To limit employment in the motion picture industry to those persons whose political beliefs are acceptable to the Committee.

4. To limit the production of motion pictures by said industry to those the content of which is acceptable to the Committee [R. 37].

(h) Petitioners, eighteen in number, appeared on various dates in 1951 and 1952 as witnesses before the said House Committee pursuant to subpoena and refused, respectively, to answer certain questions concerning their political affiliations, beliefs and associations, basing their refusal upon their constitutional rights including the privilege against self-incrimination under the Fifth Amendment to the Constitution [R. 12, 38].

(i) Petitioners, five in number, on various dates in 1951 were named as Communists, respectively, by some witness appearing before the Committee. Petitioners failed and refused to voluntarily appear before the said Committee to answer questions concerning their political affiliations, beliefs and associations, basing their refusal upon their constitutional rights including their privilege against self incrimination under the Fifth Amendment [R. 14, 38].

(j) As a result thereof and by reason of the acts of and pursuant to the aforesaid agreement of respondents, petitioners ever since the dates aforesaid have been and now are refused and are excluded from employment in the motion picture industry by these respondents and all other employers in said industry; and therefore petitioners will henceforth continue to find it impossible to obtain em-

ployment in the profession to which they have devoted a major part of their entire lives and energies [R. 36].

(k) Petitioners have suffered pecuniary loss and irreparable injury and pray for actual and punitive money damages and injunctive relief [R. 37].

The California District Court of Appeal in sustaining the judgments of dismissal of this complaint took judicial notice of portions of the actual testimony of certain of the Petitioners before the Committee, holding that "the complaint is to be implemented by the facts of which we take judicial notice." These, the Court held, include "proceedings and reports of the Committee on Un-American Activities," revealing the refusal by 18 of the 23 Petitioners to answer, on grounds of possible self-incrimination, questions concerning membership in the Communist Party [R. 67]. The complaint was construed and evaluated in the light of this judicial notice. There are additional matters of judicial notice from the same sources which are pertinent and which the State Court did not discuss in its opinion.

The Committee's investigation of the motion picture industry began in 1947 with a hearing in Washington chaired by Congressman Thomas. It was announced at the outset that the hearings were not intended as an attack upon the great majority of persons associated with the industry, but only to "expose" the "subversives" (79 in number as of that time) therein (App. B.1(a), p. 5). That the purpose of this "exposure" was to secure the discharge and permanent exclusion from the industry of the individuals exposed soon became clear (App. B.1(b), p. 7). At that time the position of leading figures in the industry was that a blacklist was illegal, and that they would not establish one. What the producers were con-

cerned with was good scripts, not the beliefs of their authors (App. B.1(c), p. 13).

The Committee's interest in and attempt to control the content of motion pictures was manifested by the presentation of testimony labelling certain motion pictures subversive on grounds that they portrayed certain aspects of American life in an unfavorable light or of Russian life as being something less than morbid. This the industry opposed as censorship (see App. B.1(d), p. 22).

Prior to the hearings the Motion Picture Producers Association (composed of the major producers in the United States) adopted a policy statement which was submitted at the hearings demanding a fair investigation "to end all investigations in Hollywood" and stating that all attempts at censorship would be resisted as an attack upon a vital American freedom. At the same time a proposal that proven Communists not be employed in Hollywood jobs was rejected for three reasons. First, such a "potential conspiracy" to refuse to hire people was opposed by the advice of the legal counsel of the group. Second, there was no way for the producers to prove that an individual was a Communist "by due process of law in the traditional American manner," as distinct from the utilization for this purpose of a power "arrogated to some Committee." Third, before the producers could act it was up to Congress to determine that a Communist is either an agent of a foreign government or an advocate of force and violence (App. B.1(e), p. 42).

What the complaint alleges and what is admitted here is the formation of the precise conspiracy which was "potential" at the time of those hearings; this "potential" conspiracy was condemned as illegal by Respondents themselves; nevertheless it has been entered into with the Com-

mittee and its members for the very purpose of destroying those freedoms which Respondents swore to defend. The campaign of the Committee to eliminate non-conformists, labelled as subversive by the Committee, from the motion picture industry as well as other media of public entertainment has continued as one of its principal preoccupations (see App. B.2(a), p. 47). So, too, with its penetration into the field of ideas which continues unabated (see App. B.2(b), p. 57).

All of the Petitioners, except one, were named as former members of the Communist Party by various witnesses testifying before the Committee (see App. B.3(a), p. 59, for citations). However, there was no evidence presented to the Committee that any of them had ever engaged in or approved any unlawful advocacy or conduct of any kind whatsoever. On the other hand, witnesses upon whom the Committee relied for its information testified that the groups to which Petitioners allegedly belonged had engaged exclusively in lawful discussion, advocacy and conduct within the area protected by the Bill of Rights. Typical matters included support of the war effort during World War II, elimination of discrimination in employment in and the cultural aspects of the motion picture industry, and support of candidates for political office (see App. B.3(b), p. 60).

During the course of various separate hearings, most of these Petitioners were called as witnesses. Some of them were questioned concerning their careers in the motion picture industry and testified to high distinctions and long service acquired in the professions in which they were then engaged.* Several were Academy Award win-

*Many of them indicated that they had lost their employment in the industry concurrently with or just prior to the receipt of subpoenas from the Committee.

ners. Gale Sondergaard had won one award for her performance in "Anthony Adverse" and had been nominated for another for her role in "Anna and the King of Siam." Ann Revere had won an Oscar for her part in "National Velvet." And Michael Wilson had written two screen plays, one of which, "A Place in the Sun" later won an Academy Award for him and the other, "the Friendly Persuasion," resulted in his nomination for an award but he was ruled out of the final vote because he was a blacklisted writer. Typical of the testimony of these Petitioners with respect to their occupations was that of Howland Chamberlin who said, "My present occupation is an actor, and I find it deeply repugnant and profoundly un-American to be smeared, blacklisted, and strangled economically by my presence before this Committee" (for record references and further details, see App. B.3(c), p. 65). The Committee's aim to blacklist these Petitioners and Petitioners' objections thereto are also a matter of record (see App. B.3(d), p. 72).

All of Petitioners claimed the protection of the Fifth Amendment when they were questioned concerning their claimed membership in the Communist Party. Many, in addition, relied upon First Amendment and related grounds (App. B.3(e), p. 77). Questions other than membership in the Communist Party and completely unrelated to unlawful association, advocacy or conduct were also asked and Petitioners refused to answer them on similar grounds (App. B.3(f), p. 82).

The State of California has established a rule of law that persons may be barred by a monopolistic combination from any opportunity to pursue their established professions because of their refusals on constitutional grounds to answer questions *under the circumstances outlined*

above, where the purpose of the exclusion is to control political expression, unless the individuals can show existing or prospective specific contracts of employment. It is this rule of law which Petitioners assert violates their rights to due process and equal protection under the Fourteenth Amendment and also runs counter to the Federal Supremacy clause of the Constitution.

On the issues of arbitrary denial of the equal protection of the laws and deprivation of liberty and property without due process of law by the State courts, a brief summary of the proceedings below appears appropriate in this statement. Demurrers to the original complaint filed by petitioners in the Superior Court were sustained without opinion, but with leave to amend [R. 28]. A demurrer to the first amended complaint, the complaint herein, was filed on behalf of the respondent motion picture companies [R. 41] and sustained by the Superior Court without leave to amend. A separate demurrer to the same amended complaint was filed by the remaining three respondents [R. 60], and sustained, but with leave to amend [R. 55]. Petitioners elected to stand on the complaint and it was dismissed as to the remaining three respondents [R. 62].

The Superior Court, in its written opinion [R. 44] held that petitioners had standing to sue for an invasion of their right to work [R. 45], despite respondents' argument to the contrary, but that the burden of pleading lack of justification was upon petitioners [R. 50]; that the terms of the concerted agreement with respect to the invocation of constitutional privileges [R. 51] and the object of the agreement to limit the political beliefs and activities of employees in the industry and the content of motion pictures [R. 52] did not show a lack of justifica-

tion. With respect to the remaining three respondents, the court construed the complaint as alleging a purposeful interference by strangers with the possibility of business relations [R. 54], but held that the facts showing a tortious inducement of the refusal to enter into business relations had not been alleged [R. 54].

On appeal in the District Court of Appeal, petitioners urged that the judgments of dismissal deprived petitioners of their liberties and properties without due process of law in violation of the due process provisions of the Fourteenth Amendment (Opening Br. p. 7); that the monopolistic combination (*id.*, pp. 15-18) deprived petitioners of the fundamental right to work for a living under the Constitution (*id.*, pp. 18-21); that the combination, affected with a public interest, had arrogated powers denied to government itself (*id.*, pp. 21-24); that the exercise of constitutional privileges including the privilege against self-incrimination did not justify the concerted agreement herein (*id.*, pp. 24-34); that the respondents had invaded rights secured by the Constitution and laws of the United States (*id.*, pp. 28-29); and that the purpose of the conspiracy was patently violative of the freedoms of belief, speech and association (*id.*, pp. 36-44).

Respondents, on the other hand, urged the failure to allege the existence of a legally protected interest (Resp. Br. pp. 15-24), and then argued in the remainder of its brief (*id.*, pp. 25-79) that none of petitioners' constitutional arguments were meritorious and that the conduct of respondents had been justified as a matter of law.

In reply, petitioners asserted that respondents' argument on lack of standing to sue misconceived the constitutional issue that the complaint alleged a "permanent and serious injury" involving "total exclusion from a

chosen calling" (Reply Br. p. 22); that the right to earn a living is "a liberty protected by the Constitution" (*id.*, p. 37); that the petitioners had been deprived of their livelihoods because they had exercised lawful constitutional privileges (*id.*, pp. 38-46); that respondents were engaged in censorship of ideas forbidden to government itself (*id.*, p. 57); that respondents had failed to meet the constitutional issues raised in the case (*id.*, pp. 58-66); and that, if the judgments were permitted to stand, they would deprive petitioners "of their liberty and property without due process of law and the equal protection of the laws under both the state and federal Constitutions" (*id.*, p. 68).

The opinion of the District Court of Appeal [R. 63] disregarded the rulings of the Superior Court. The Court, for the first time since the inception of the proceedings, held that the complaint was insufficient because of the failure to allege an existing or prospective specific contract [R. 75]. The Court stated that "in view of our conclusion we do not reach other points argued by counsel" [R. 77]. The denial of leave to amend was affirmed [R. 77].

The District Court of Appeal held that it would judicially notice that the Communist Party is "a 'conspiratorial and revolutionary junta,' one of whose objectives is the overthrow of our government by force and violence" [R. 68], so that an inquiry at a legislative hearing concerning a person's past or present membership in the Communist Party, or the statement of a witness that a person has been such a member, has "nothing whatever to do with their political affiliations" [R. 68], and such latter allegations in a complaint can be disregarded and the aforesaid facts, judicially noted, substituted in their

place in determining the sufficiency of the complaint. This construction of the complaint, however, was not any part of the court's stated basis for its affirmance of the judgments of dismissal.

Following the decision of the District Court of Appeal below [R. 63], where for the first time respondents' argument on the necessity to plead a right based on a specific contract or prospect of one was accepted, petitioners filed their petition for rehearing. It was urged that "the holding of this court that appellants are without legal redress against the admitted wrongdoers who deprived appellants of their right to pursue their chosen avocations merely because appellants have not alleged the existence or probability of a contract of employment denies appellants the equal protection of the law, and deprives appellants of their liberty and property without due process of law in violation of the equal protection and due process provisions of the Fourteenth Amendement" (Pet. for Reh. p. 10).

The petition for hearing in the Supreme Court of the State of California raised all the aforementioned constitutional issues fully and at length.

Summary of Argument.

1. The ruling of the court below denying petitioners all relief solely because of the failure to allege the existence of a specific contract or the direct prospect of one deprivated petitioners of their liberty and property without due process of law. The constitutionally protected right to work includes freedom to choose and pursue a calling and to compete for employment on a basis of equality under the law. The concerted agreement and the conduct of respondents were deliberately calculated to curtail these rights by making their exercise dependent upon the surrender of constitutional guarantees.

The right to work includes as a valuable incident the standing with prospective employers, from which advantageous employment relationships may be expected. The liberty to choose and pursue a calling presupposes the freedom of employers to compete among themselves and freely to choose their employees. Respondents' monopolistic combination concededly made such uncoerced choice impossible.

The court below made protection of the right to choose, pursue and compete for employment dependent on the successful outcome of its exercise. But the gist of the wrongdoing alleged in the complaint is not the loss of an employment contract; it is the invasion of the right to follow a calling and to seek and obtain the free judgment of the employer as to whether or not he is willing to offer a contract of employment. Petitioners had achieved that status in the industry which afforded each of them a reasonable prospect of obtaining employment in the industry if the wrongful conduct of respondents had not intervened.

That petitioners have been denied their fundamental liberties by the action of the judicial arm of the State appears plain. Even if the availability of a legal remedy for relief from the wrongful invasion of fundamental liberties were to be deemed a mere privilege, the arbitrary denial of any remedy for the highly injurious wrong admittedly committed here was in violation of the Fourteenth Amendment. But the protection of constitutional rights by a state court is not a mere privilege, and a state may not sanction a total deprivation of the right to earn a livelihood by acting in such a manner as to deny all legal and equitable relief against the wrongdoers.

Nor is this a case solely of "private conduct." Comparably with *Marsh v. Alabama*, 326 U. S. 501, these respondents by their monopolistic control of all employment opportunities in the industry and by their action in concerted agreement with members of the legislative committee, are virtually exercising governmental powers. The combination has been allowed, pursuant to the judicially established law of the state, to assume the powers of a legisla ..e, the functions of the judiciary, and the duties of law enforcement; it exercises these powers to undermine constitutional rights, liberties and privileges, action forbidden under the Constitution to Government itself. The state court, by requiring pleading and proof of the loss of a specific contract, sanctions the conduct of a monopolistic combine whose own wrongdoing has made it impossible for persons to obtain contracts. It arbitrarily deprived petitioners of all remedies legal and equitable for the destruction of a constitutionally protected property right and liberty thus denying them due process of law.

2. The court below arbitrarily denied petitioners the protection of freedom of speech and association by refusing any relief from the combination which conditioned the right to work on the surrender of these fundamental liberties. The purpose of respondents' concerted agreement was to deprive persons who exercised their constitutional privileges before the Committee, of their chosen callings in the industry, all to the end that the political beliefs and activities of employees, and the content of motion pictures, should conform to standards promulgated by the Committee.

Freedom of association is an indispensable condition of the exercise of freedom of speech and assembly. The dissenting voice is stilled by the elimination of free political association. Censorship breeds conformity. When the state establishes a principle of law, regardless of the department of the government involved or of the procedural process through which the law is declared and that principle limits the right to dissent, then the protection to which these fundamental liberties are entitled under the due process clause is denied.

The court below not only sanctioned the invasion of the basic freedoms of these petitioners, but the effect of its ruling was to abridge freedom of expression in an entire vital area of communication, the fields of art, culture and ideas. No right of an individual producer of motion pictures acting alone is here involved. The effect of the conspiracy alleged in this complaint is to preclude individual decisions reached in the process of competition for the most desirable product. Competition in ideas is stifled, and conformity and self-censorship become the rule.

3. The right of witnesses freely to claim their constitutional privileges in a Congressional legislative inquiry is one secured against individual invasion by the Constitution and the laws of the United States. Here, despite respondents' admission of wrongdoing, the great importance of preserving inviolate the privileges afforded by the First and Fifth Amendments and the duty of the state court under the supremacy clause of the Constitution to protect the exercise of these federally guaranteed rights, the state court denied all redress.

4. The ruling of the court below arbitrarily denied petitioners the equal protection of the laws in violation of the Fourteenth Amendment. It is unreasonable and capricious to grant relief to a person who has a specific contract or the reasonable prospect of one, but to grant no relief to one who has been permanently barred by a monopolistic combination from ever competing for a contract of employment in an entire industry. It is unreasonable to grant immunity to the wrongdoers here, while subjecting to liability those who induce a breach of a specific contract. What the state has done is to afford protection to lesser rights while refusing it for more substantial ones and, at the same time, subjecting the minor wrongdoer to liability while totally immunizing the major wrongdoer.

In dismissing the complaint, the court below refused to give petitioners the benefit of established state law which would have required a ruling favorable to them, for the state ordinarily places upon the wrongdoer the risk of uncertainty in the proof of damages which his own wrong created; it permits the recovery of damages for injury to the right to work, without regard to the

existence of a contract, or the prospect of one; it permits damages for loss of good will even without the existence of specific contracts or prospects of one; and it permits at least nominal damages, even though no actual damages can be proved. The state also grants equitable relief for invasions of property rights, holding that an injury occurs as a matter of law and that an injunction will issue against continuous wrongdoing, whether damages are ascertainable or not. Petitioners were arbitrarily placed in a special classification to which was denied the benefit of all of these rules of law.

In stating, as a matter of judicial notice, that the allegations in the complaint had nothing whatever to do with petitioners' political affiliations, associations or beliefs, but concerned membership in a "conspiratorial and revolutionary junta," the court below acted arbitrarily and capriciously. The state court erroneously relied on a concurring opinion in *American Communications Association v. Douds*, 339 U. S. 382. This court has never held that the entire Communist Party is a conspiracy to overthrow forcibly the Government, and it is arbitrary to take judicial notice of that which can only be established by proof of individual wrongdoing. Nor was it lawful to infer criminal conduct from invocation of First and Fifth Amendment privileges.

By classifying petitioners through this process of judicial notice as members of a revolutionary conspiracy, the state court withdrew from them the protection of California statutes prohibiting employers from controlling or coercing the political activities and affiliations of employees. Thus petitioners were denied the equal protection of the laws.

5. The attempt of the respondents to justify their tortious invasion of petitioners' fundamental rights as a matter of law is without basis in view of the posture of the proceedings and the constitutional protections afforded petitioners. The argument that respondents had merely combined for economic self-interest disregards the allegations in the complaint, admitted by demurrer, and relies on conjectural inferences which, if pertinent at all in the light of the requirements of the Constitution, are properly subject to proof directed to a trier of facts. The attempt to cast the holding of the court below as merely a choice of competing state policies ignores the fact that one choice leads to the denial of constitutional guarantees.

6. The dismissal of the complaint as to the remaining three respondents upon the same ground equally deprived petitioners of rights under the Constitution. Neither the members of the legislative committee, nor their investigator, were acting within the scope of their jurisdiction, when individually and in their official capacities they admittedly entered into the conspiracy alleged in the complaint and actively furthered its objectives.

7. The facts and principles of law showing violations of the Fourteenth Amendment and of the supremacy clause of Article VI of the Constitution simultaneously establish the jurisdiction of this Court.

ARGUMENT.

I.

The State Court's Denial of All Remedies for the Admitted Wrongful Invasion of Petitioners' Freedom to Pursue Their Chosen Callings Deprived Petitioners of Their Liberty and Property Without Due Process of Law in Violation of the Due Process Provisions of the Fourteenth Amendment.

A. This Court has uniformly held that the right to pursue one's business, calling, trade, or occupation is a liberty which the law protects against unjustifiable or wrongful invasion, deprivation or abridgement, for everyone ordinarily has a right to enjoy the fruits and advantages of his own enterprise, industry and skill, and to full freedom in disposing of his own labor according to his own will. "The theory upon which our political institutions rest is, that all men have certain inalienable rights —that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all vocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law." *Cummings v. Missouri*, 4 Wall. (U. S.) 277, 321.

The right to work is a large ingredient in the civil liberty of the citizen. Cut off the right of the citizen to choose his vocation, the right to earn his bread by the profession which he has learned, and the very right to live as a dignified human being is endangered. *Butchers' Union S. & L. L. Co. v. Crescent City L. L. & S. Co.*, 111 U. S. 746, 754-766. "For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of

life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U. S. 356, 370. See also, *Allgeyer v. Louisiana*, 165 U. S. 578, 589; *Smith v. Texas*, 233 U. S. 630, 636; *Truax v. Raich*, 239 U. S. 33, 42; and *Meyer v. Nebraska*, 262 U. S. 390, 399. That this essential freedom is firmly imbedded in our constitutional system is emphasized by the recent decisions of this Court, upholding in a variety of situations the liberty to follow a chosen profession or avocation: *Takahashi v. Fish Comm'n*, 334 U. S. 410; *Wieman v. Updegraff*, 344 U. S. 183; *Slochower v. Board of Higher Education*, 350 U. S. 551; *Schware v. Board of Bar Examiners*, 353 U. S. 232; *Konigsberg v. State Bar*, 353 U. S. 252. See also, *Parker v. Lester*, 227 F. 2d 708, 713, 717 (C. A. 9, 1955).

The state court held that no "legally protected interest of plaintiffs has been interfered with" [R. 75] because no tortious invasion of a contract right had been alleged. Since this was the sole stated ground of the decision of the court below, it becomes important to analyze the legal ingredients contained in the "right to work" as contrasted with the right "in a specific contract."

The first interest included in the right to work is the freedom *to choose* an occupation or profession which a person desires to pursue. As the Court stated in *Allgeyer v. Louisiana*, 165 U. S. 578, "the freedom of adopting" and following the occupation which he prefers is "a material part of the liberty of the citizen." *Supra*, at 590. *Truax v. Raich*, 239 U. S. 33, 38. Yet, in the posture of these proceedings, the respondents by their demurrer concede that the terms of their concerted agreement, and

the means used to make that concerted agreement effective, are deliberately calculated to curtail petitioners' freedom of choice. For if petitioners are to continue in the professions "to which they have devoted a major part of their entire lives and energies" [R. 10, 36], they must surrender their First and Fifth Amendment rights, as well as rights guaranted to them by the laws of the United States (2 U. S. C. 192; see Appendix A). The petitioners are given no choice, "except a choice between the rock and the whirlpool"—an option to forego privileges which are vital to their security and freedom as well as that of the public, or loss of opportunity to earn a living. *Frost Trucking Co. v. R. R. Commission*, 271 U. S. 583, 593. The admitted conduct of respondent is "necessarily calculated to curtail the free exercise of the right thus secured." *Terral v. Burke Construction Co.*, 257 U. S. 529, 532. The petitioners cannot retain the opportunity of earning a livelihood in their established vocations except by "purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution." *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 439.

Included in the right to work is not only the liberty of *choice* of employment, but the right *to pursue* a calling. As was stated in *Butchers' Union S. & L. L. Co. v. Crescent City L. L. & S. Co.*, 111 U. S. 746, 763: "... the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects—the liberty of pursuit." The general rule "undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This

general right cannot be taken away." Cooley, *Constitutional Limitations* (8th ed., 1927), Vol. 2, p. 1341.

This pervasive principle runs through all the decisions dealing with the right to work. The right to acquire property "by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired." *International News Service v. Associated Press*, 248 U. S. 215, 236. "The plaintiffs here are citizens of the United States and the rights and liberties which they assert relate not to any public employment present or prospective, but to their right to pursue their chosen vocations as merchant seamen." *Parker v. Lester*, 227 F. 2d 708, 717 (C. A. 9, 1955). ". . . the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it." *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 742, 65 Atl. 165, 171.

The right to choose and the right to pursue a calling together sum up the right to compete on a basis of equality under the law. Ours is a competitive system. Deprive a man of the opportunity to compete and the single most essential economic guarantee of the system, essential to life itself, is denied him. "Free enterprise is a basic concept of our economy but contained therein is the corollary of free and fair competition." *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358, 365 (C. A. 9, 1955). It is for this reason that this Court has said that ". . . the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens," (let alone monopolistic com-

bines), is "a natural or inalienable right" which the state has the duty to protect. *Hodges v. United States*, 203 U. S. 1, 18. Here the respondents by concerted action totally excluded petitioners from their established occupations in the motion picture industry.[1] It is conceded that by reason of such conduct petitioners would "henceforth find it impossible to obtain employment in the profession to which they have devoted a major part of their entire lives and energies" [R. 36].

The respondents were under a duty not to interfere with petitioners' right to pursue their callings. Yet, respondents admit that they, monopolizing all employment opportunities in the industry, bound themselves to exclude petitioners from the industry, coerced all other employers to do the same, and circulated blacklists "with the direction and intent" that petitioners be excluded from the industry. The respondents wilfully drew a cordon about the entire industry, policed it, and effectively throttled any attempt by petitioners to pursue their chosen callings. It is difficult to envision a more direct and immediate violation of a legally protected interest than is thus presented by the proceedings here.

Moreover, in addition to liberty of choice and liberty of pursuit, the right to work includes the full enjoyment of the citizen's liberty to have all possible employers left free to employ him or not as they may voluntarily elect. He is entitled to compete for employment in a

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[1] The court below agreed that the complaint reads "Plaintiff Wilson *is* by profession a motion picture writer" [R. 64] (emphasis supplied). The allegation of present *status* was made by each petitioner. It was clear, therefore, that petitioners at the time of the suit were members of their respective professions and vocations.

market in which employers are free to compete for his services. This freedom of the employer is plainly violated when those who monopolize employment opportunities in an industry bind themselves not to exercise a free choice, and then coerce the other employers by malicious inducement and blacklists to refrain from exercising their free choice as well. The gist of the wrongdoing in such case is not the loss of an employment contract, but interference with the right to obtain the free judgment of the employer as to whether or not he will offer a contract of employment.

The recognition of the right which one man thus has in the freedom of another finds its roots in long-established precedents. See, *Quinn v. Leatham* (1901), A. C. (Eng.) 495, 534, 535.[2] This Court has stated: "The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable

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[2]"He [the plaintiff] had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. *But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so.* Any interference with their liberty to deal with him affects him. . . . . Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him." (Emphasis supplied.) *Aikens v. Wisconsin*, 195 U. S. 194.

although the employment is at will," *Truax v. Raich*, 239 U. S. 33, 38. In asserting his interest in the employer's freedom, the employee is not claiming for himself the rights of others or seeking redress for damages done to others. It is the employee who is wronged through this restriction upon the liberty of the employer; his injury is the direct consequence of the employer's loss of independence. When the employer "no longer uses his own judgment, but, by entering into the combination, agrees to be bound by its decree" (*Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 123, cited in *International News Service*, 248 U. S. 215, 237), a person immediately affected by this loss of freedom is the one pursuing employment. See also, *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 154; *Barrows v. Jackson*, 346 U. S. 249, 257; *Pierce v. Society of Sisters*, 268 U. S. 510, 535; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 251.

Moreover, as a protection for the right to work, the law does more than protect the liberty of choice, pursuit and a free market. It protects against any wrongful invasion of a prospective advantageous relationship, even if that prospective relationship is predicated exclusively upon the future good will of prospective employers, employees or general customers in an industry. Here petitioners had admittedly been employed in the motion picture industry from five to twenty-five years. They had a background of experience, reputation and esteem in the industry, as respondents well knew [R. 64]. The complaint makes clear that they had a "reasonable prospect" of obtaining employment in the industry if the wrongful conduct of respondents had not intervened. "The pecuniary value of such reasonable probabilities is incal-

culably great, and is recognized by the law in a variety of relations." *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 252. See also, *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 266; *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555, 564.

The fact is that the constitutionally protected "right to work" comprises a bundle of interests—choice pursuit, free market, and prospective advantageous dealings predicated upon prior accomplishment and relationships. It was these interests which the complaint plainly pleaded and which the respondents admittedly invaded. In denying all legal and equitable relief for this "wrongful and injurious invasion" of petitioners' rights and interests, the state court sanctioned for all practical purposes the deprivation of petitioners' liberty and property without due process of law.

What the state court did down below was to make protection of the right to work dependent on the successful culmination of the exercise of that right. But liberty to pursue an occupation, as in the case of so many other freedoms, cannot be independent for its free exercise on whether or not its objective is finally obtained. The exercise of the right to work is a means to an end—the contract of employment. To that extent, the right to work and the right in a contract of employment have a connection. But while a tortious invasion may occur to both "means" and "end" at one and the same time, still the invasion of one or the other may occur separately and, where they do, they are separately remediable. *Cf., Butchers' Union S. & L. L. Co. v. Crescent City L. L. & S. Co.*, 111 U. S. 746; *Truax v. Raich*, 239 U. S. 33; *Angle v. Chicago, St. P., El. Ry.*, 151 U. S. 1.

The state cases relied upon by the court below [R. 70] did not involve the question of an invasion of the fundamental right to work. They dealt solely with inducement of breaches of specific contract or specific prospective advantages. In none of these cases were the parties claiming that their liberty of choice of business was restricted, or that they had been completely excluded from the industry, or that the free judgment of their prospective customer had been initially coerced or restricted. All that they claimed was that the judgment of one particular customer had been freely exercised, or would have been freely exercised, in plaintiffs' behalf if defendants had not wrongfully steered that free judgment in defendants' favor. What the plaintiffs failed to plead or prove in those cases was the facts to substantiate such claims.

Thus, in *Campbell v. Rayburn*, 129 Cal. App. 2d 232, 276 P. 2d 671, the only California case cited by the court, the gist of the complaint was solely that defendant had wrongfully induced two persons in Palm Springs not to rent office space to plaintiff. The principal reliance of the court below upon this decision indicates the infirmity of the state court's action. In upholding a dismissal of the compaint in the cited case, the court stated that no facts had been alleged, among things, showing "the availability or lack of accommodations other than those referred to." *Supra*, at p. 234. The only right asserted was a right in a particular office space. There was no claim of a monopoly controlling all office space conspiring to totally exclude the plaintiff from securing any space anywhere. Since there is ordinarily no legally protected right in a particular office space, the plaintiff failed to recover in his suit for damages when he failed

to allege facts showing either that he had a lease for the premises or the reasonable prospect of one. Whatever defendant had done, plaintiff had not shown how any interest of his had been invaded by defendant's conduct. Clearly, the facts in the two cases do not bring them within the same area of legal rights, nor could the legal and constitutional consequences arising from the dismissal of the complaint herein flow from the dismissal in the *Campbell* case. The other state cases cited by the court below are in the same tenor and are equally inapplicable here.

The court below disregarded that the fact of injury to a fundamental right was placed in the complaint. In holding that petitioners were bound to plead the reasonable prospect of *a specific contract*, the court confused the problem of satisfactory proof of loss with the problems of liability. The crux of the petitioners' complaint was respondents' unjustifiable interference with their right to pursue their lawful callings, and to reap the earnings of their industry, their experience, their reputation and esteem. To what extent petitioners were thus injured was a matter for the trier of the facts to decide, and the complaint made perfectly clear that it was possible for the trier to estimate both the value of what petitioners had lost and what they would have received if respondents had not brought the curtain down around the industry to the exclusion of petitioners. See, *Truax v. Corrigan*, 257 U. S. 312, 327; *Louis Kammon, Inc. v. Flink*, 113 N. J. L. 582, 75 Atl. 62, 68; *Godin v. Niebhur*, 236 Mass. 350, 128 N. E. 406, 407; *Doremus v. Hennessay*, 176 Ill. 608, 52 N. E. 924, 925-6; *Meadowmoor Dairies v. Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. 2d 308; Cooley, *Torts*, (4th ed.), Vol. 2. Sec.

230, pp. 196-7: Prosser, *Torts* (1955), Sec. 107, pp. 745-8; *Restatement of Torts*, Sec. 766, p. 52; 86 C. J. S., *Torts*, Sec. 43, p. 955.

Finally, the court below, restricting its ruling to the requirement that a right in a specific contract be pleaded and proved, overlooked the fact that petitioners were also seeking equitable relief from the irreparable injury being done them by the continuous wrongdoing of respondents, wholly apart from the question of the amount of compensatory damages due them. "Where irreparable injury is threatened, or the damage be of such a nature that it cannot be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction." *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 12. The denial, even of injunctive relief by the state from the admitted wrongdoing of respondents thus completely destroyed petitioners' fundamental right to work in their chosen occupations. But a State, acting through its judiciary, may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy. *Brinkerhoff-Faris T. & S. Co. v. Hill*, 281 U. S. 673, 682. See, *Truax v. Raich*, 239 U. S. 33, 38; *International News Service v. Associated Press*, 248 U. S. 215, 236.

B. Under the circumstances of this case, the state, by dismissing the complaint, has denied petitioners the liberty, encompassed by the Fourteenth Amendment, to pursue their chosen callings. The conduct of the Motion Picture Producer Respondents, barring petitioners access to an entire industry because of petitioners' defense of their First Amendment and Fifth Amendment rights for

the purpose of restricting free expression in the entire industry, cannot be relegated simply to the sphere of "private conduct." Neither surface appearances nor purely technical considerations should be permitted to obscure reality. The Constitution demands examination of the essence of things. For "the Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." *Cummings v. Missouri*, 4 Wall. 277, 325. See also, *Loubriel v. United States*, 9 F. 2d 807, 808; *United States v. Bryan*, 339 U. S. 323, 334-5. In a changing society the emergence of new forms is inevitable. To obscure the substance for which forms are mere vehicles would substitute the naked letter of our fundamental law for its spirit and purpose. *Cf.*, Paul J. Liacos, "Rights of Witnesses Before Congressional Committees," 33 B. U. L. R. 337, 386; *Sweezy v. New Hampshire*, 354 U. S. 234, 255, 267, Mr. Justice Frankfurter, whom Mr. Justice Harlan joins, concurring in the result; *United States v. Classic*, 313 U. S. 299.

In this case, the form of suppression is relatively new, only because of the character of the members of the conspiracy and the nature and extent of their wrongdoing. It is a composite of the conduct of a Congressional Committee and of a group of individuals and corporations controlling an entire major industry acting in concert with the Committee. The novelty of the Committee participation is discussed in a recent decision. "In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government, but other subjects of congressional interest also contributed to the changed

scene. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens. It brought before the courts novel questions of the appropriate limits of congressional inquiry." *Watkins v. United States*, 354 U. S. 178, 195. As the opinion of Mr. Chief Justice Warren notes, these "novel questions" concerned "the application of the Bill of Rights as a restraint upon the assertion of governmental power in this form" (345 U. S. at 195.) A variation of the same problem is presented here.

It is contended, however, that the power and duty of this Court rests upon the Fourteenth Amendment which is a limitation upon the power of the state, not upon the conduct of private individuals or groups; that the state is not the culprit here; that it has merely refused to intervene to prevent abridgment of freedoms flowing from non-governmental sources. To this contention there are several answers.

First, the state has acted. Its dismissal of the complaint in this case was a denial of access to courts of the state. Even if the right to procure relief from courts of law were a mere privilege, the denial of that privilege in this case could not be reconciled with the commands of the Fourtenth Amendment. The right to exclude altogether does not include the right to do so for a reason or in a manner which abridges constitutional rights. Thus it has been held that the power of the state completely to exclude telegraph poles from its streets may not be exercised in such a manner as to regulate interstate commerce; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 114; *Cf. Southern Railway Co. v. Greene*, 216 U. S. 400; nor, assuming the power of the state to exclude completely corporations from its borders, may

it do so where the consequence is the denial of the corporation's constitutional rights. *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434-5.

As was stated in the dissenting opinions of Justices Holmes and Brandeis in *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 430-1, 437, the United States may "give up the post office when it sees fit" but it may not operate that institution in such a manner as to impinge upon freedom of speech and of the press. At a later date this Court cited those dissents in support of its view: "But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever." *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 156.

So too, the concept that because government employment is a privilege, the state is free to impose thereon any conditions it deems appropriate has been discarded. No longer may a state exclude from employment those who refuse to take an oath which indiscriminately intermingles innocent with knowingly evil activity. *Wieman v. Updegraff*, 344 U. S. 183, 191. Even though Slochower did not have "a constitutional right" to be employed as a teacher, the Fourteenth Amendment protected him against arbitrary state action predicated upon an unreasonable condition and resulting in the denial of employment to him. *Slochower v. Board of Education of New York*, 350 U. S. 551, 555, 559. *Cf.*, "Inquiry Into Political Activity," 65 Y. L. J. 1172.

Assuming therefore that resort to the courts for protection of constitutional rights is a privilege, it does not follow that the refusal of the Court to provide any remedy

raises no constitutional question. An arbitrary denial of all relief runs afoul the due process clause just as would a similar refusal of other state privileges. *Smith v. Cahoon*, 283 U. S. 553; *Railway Express Agency v. New York*, 336 U. S. 106; *Cf. Toomer v. Witsell*, 334 U. S. 385; *Wheeling Steel Corp. v. Glander*, 337 U. S. 562; *Philips Petroleum Co. v. Jenkins*, 297 U. S. 629; *Power Co. v. Saunders*, 274 U. S. 490; *Hanover Insurance Co. v. Carr*, 272 U. S. 494.

The fact that state action is negative rather than affirmative—a denial of benefits rather than the direct imposition of punishment—must not be allowed to becloud the issue. "'Negative' and 'affirmative,' in the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between 'nonfeasance' and 'misfeasance.'" *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 141-142. The state may not conduct its affairs in such a manner as to deny to its citizens and residents the freedoms the Constitution guarantees. The use of the taxing power to inhibit freedom of the press is not condemned because the form of state action is affirmative. The withholding of subsidies upon conditions calculated to control the content of the press would be no less a denial of due process. Either method must be stricken down because each achieves the same end—a diminution of liberty of communication.

The refusal of the state to protect the right of individuals to compete for work in an industry from which they have been totally excluded by a monopolistic combine has no impact substantially different from that falling upon individuals excluded from government em-

ployment. In either instance if the individuals' opportunity of employment has been denied because of their exercise of political rights, the state action undermines those rights. Such exercise of governmental powers is a most effective means of persuading individuals to mould their beliefs, utterances and associations in a fashion which will not jeopardize their means of livelihood. By dismissing the complaint in this case, the California courts cast their weight upon the side of suppression of petitioners' liberties. This the Fourteenth Amendment to the Constitution forbids.

Second, the protection of constitutional rights by state courts is not a mere privilege. In this area the state cannot, even if it would, be a neutral. Whether it grants or withholds its aid, it affects one way or the other the civil liberties of its citizens. The police officer who stands by while an unprovoked assault is committed on another because of his religious views is guilty of a breach of duty owed by the state, the character of which may be aggravated but is not essentially changed if he joins in the assault. *Catlette v. United States*, 132 F. 2d 902, 907 (C. A. 4, 1943). Here, there has been no physical assault upon petitioners which the state has abetted by the withdrawal of its protection. Rather there has been an economic assault, by a group capable of depriving petitioners of their means of earning a livelihood. When the state announces that it affords no protection against such violence, it thereby sanctions what has already happened and invites its repetition. This breach of the duty of the state to protect constitutional rights of its citizens is violative of the Fourteenth Amendment.

Third, the view that the conduct of the motion picture producer defendants is to be treated as purely private

conduct is an obfuscation of underlying reality. The right to control entry into or competition in a profession, occupation or industry does not belong to private individuals or groups. To the extent that control is permitted within this area, it falls within the province of the state. If private entities exert this power they should not be allowed to defend as private action the power of the state which they have usurped. Nor may the state take the position of a mere observer while such usurpation of its powers is utilized as a means of abridging constitutional freedoms. The time is past when a dogmatic concept of private property may be allowed to stand between the people and their constitutional rights.

This principle is perhaps most clearly enunicated in *Marsh v. Alabama*, 326 U. S. 501. There a member of Jehovah's Witnesses attempted to distribute religious literature within the confines of a company town and was convicted under the Alabama law for the crime of remaining on the premises of another after having been warned not to do so. The court held that this conviction was a violation of the First Amendment guarantees of freedom of press and religion. The case is bottomed upon the premise that where private companies enter an area of public use, their private property may not be controlled in such a way as to interfere with the constitutional rights of individuals. Even mere acquiescence by the state in such deprivation of constitutional rights by private corporations may be a denial of due process. A state may not *permit* a corporation to govern a community of citizens in such a manner as to restrict their fundamental liberties.

Here it is petitioners' contention that the state has established a rule of law permitting private employers to

govern an entire industry in such a manner as to deprive citizens of their fundamental liberties. As the Court in the *Marsh* case said: "The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the constitutional guarantees. . . . . ." 326 U. S. at 508. Nor may the managers of the corporations which control the motion picture industry curtail either the right to work or the liberty of press and of speech of the petitioners in this case. The state in this case may no more permit such a combination to abridge the constitutional liberties of its citizens than it could allow the corporation in the *Marsh* case to do so, notwithstanding the claim of immunity of private business. "In our view the circumstances that the property rights to the premises where the deprivation of liberty here involved, took place, were held by others than the public, is not sufficient to justify the state's *permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties. . . ." (Emphasis added; 326 U. S. at 509.) The motion picture industry should not be permitted by the State of California to govern that industry so as to restrict the fundamental liberties of citizens having or desiring employment therein.

In a concurring opinion in *Marsh*, Mr. Justice Frankfurter stated that a company-owned town gives rise to a network of property relations but it is nevertheless a town and that "these community aspects are decisive in adjusting the relations now before us, and more particularly in adjudicating the clash of freedoms which the Bill of Rights was designed to resolve—the freedom of the community to regulate its life and the freedom of the individual to exercise his religion and disseminate

his ideas." Title to property, he said, cannot control issues of individual liberties "which arise precisely because a company town is a town as well as a congeries of property relations." 326 U. S. at 510. The group of motion picture industry employers by their control of the entire industry are exercising something akin to governmental powers. Under these circumstances the mere fact that they are private employers cannot determine the issues relating to the freedoms secured by the Constitution which the case presents.

The proposition that private property may be used in such a manner or for such a purpose that a denial of public access thereto or enjoyment thereof for certain purposes may be treated as tantamount to state action did not originate with the *Marsh* case. This principle had been long applied to such "things of public concern" as privately-owned roads, railroads, bridges, ferries, and other means or avenues of locomation. *Commissioner of Dodge County v. Chandler*, 96 U. S. 205, 208.[3]

> ". . . Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be juris privati only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De

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[3]It has been held that a statute may properly be construed to require an employer to permit his employees to use his property for certain union purposes at certain times and under certain conditions. *Republic Aviation Corp. v. N.L.R.B.*, 324 U. S. 793. If an individual employer may not use his own property in such a way as to violate the Board's interpretation of the National Labor Relations Act, is it not even clearer that a group of employers controlling all employment in an industry may not use their power of employment in such a way as to violate the constitutional rights of those seeking employment with them?

> Portibus Maris, 1 Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. . . . ." *Munn v. Illinois*, 94 U. S. 113, 126.

Of course, one can distinguish between the right of a state to regulate and its refusal to interfere with the manner in which private business operates. But the right of a state to act can exist only because of the fact that it has a duty to protect the legitimate interests of its citizens. It exercises the right in order to fulfill the duty. Where a monopoly exerts its power in such a manner as to deprive citizens of their constitutional rights, the same basic legal theory which affords the state the right to regulate property affected with a public interest imposes upon it the duty to exercise that power wherever necessary in order to protect the constitutional rights of its citizens.

Where a group of employers control all employment opportunities in an industry, they possess the power to determine who may work in the industry and earn his livelihood therein and on what terms. The right to work in the industry is dependent upon the will of those who dominate the industry. Opportunity to compete for employment in a major industry is as much a matter of public concern as is access to the means of locomotion. Those enjoying a monopoly in an industry possess no greater right to condition access thereto upon the surrender of constitutional rights, privileges and liberties than do the private owners of bridges or railroads to condition use of their facilities upon such a forfeiture.

". . . and certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce." *Marsh v. Alabama, supra,* 326 U. S. at 507.

It is a facile generalization to maintain that what one may do lawfully, all may do in combination. When a combination takes on the form of a conspiracy, when it coerces its members and deprives them of the exercise of their free judgment, when pursuant to the conspiracy the members commit overt acts intended to bring the conspiracy into fruition, when the object and intent of the conspiracy is to injure persons in the exercise of their fundamental rights, when the very terms of the conspiracy are contrary to the letter and spirit of the fundamental law, and when the ultimate object of the combination is to attain results hurtful to the public and individuals, it is impossible to justify such conduct by pointing to what one individual could do if he were free from the coercive control of such a combination. With respect to unlawful combinations, the circumstances of the particular case as presented by the record must be appraised if fundamental rights are to be protected. *Aikens v. Wisconsin,* 195 U. S. 194, 205.

The rule has been repeatedly iterated in diverse situations. "It is familiar doctrine," stated this Court in *United States v. United States Gypsum Co.,* 333 U. S. 364, 401, "that lawful acts may become unlawful when taken in concert." "An act harmless when done by one may become a public wrong when done by many, acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public, or to the individual against whom the concerted action is diretced." *Grenada Lumber Co. v.*

Mississippi, 217 U. S. 433, 440. See also, *Steele v. Bulova Watch Co.*, 344 U. S. 280, 287; *Binderup v. Pathe Exchange*, 263 U. S. 291, 312; *Swift & Co. v. United States*, 196 U. S. 375, 396; *Dietrich v. Cape Brewery & Ice Co.*, 315 Mo. 507, 521, 286 S. W. 38, 43.

The fact is that this combination is not a social club or fraternal association. It admittedly has obtained a monopoly of all employment opportunities in the motion picture industry. It is an industry affected with a public interest, as has been stated, and it has corresponding obligations. See, Note, *Monopolies, the Motion Picture Industry*, 15 Univ. of Det. L. J. 178 (1952); Marcus, *Antitrust Laws and The Right to Know*, 24 Ind. L. J. 513, 533 (1949); McDonough and Winslow, *The Motion Picure Industry*, 1 Sanf. L. Rev. 385 (1949); *United States v. Paramount Pictures, Inc.*, 334 U. S. 131. This combination is not merely choosing employees as a club would decide what members it desires. What this combination does affects the fundamental right to work for a living. It is for this reason that employers in the industry must be free to make their own decisions with respect to their employees. The vice of this monopolistic combination lies in the coercion, intimidation and economic pressure which lies in such a group, not only as against these petitioners and all others similarly situated, but also towards its own more reluctant members. Here the damage arises not from the unwillingness of one employer to offer a profitable employment; here the damage is far gerater because the combination has made it impossible to seek out any or all employers. "The evil is in the combination. Without it the several groups of coal-carrying and coal-producing companies have the power and motive to compete. That each may for itself advance the price of coal or cut down the production, is true. But

in the power which each other group would have to compete would be found a corrective." *United States v. Reading Co.*, 226 U. S. 324, 353. Accordingly, where such factors of coercion, monopoly, and economic pressure as are present in the case herein are involved, with total deprivation of the right to work as a consequence, liability plainly exists. See, Section 765 of the *Restatement of Torts*, comment (a).

This combination, affected as it is with a public interest, has received the sanction of the State to assume the powers of a legislature, the functions of the judiciary and the duties of law enforcement. This combination purports to regulate, limit and control the exercise of the rights of speech, belief, opinion and association, and the content of art and literature; it purports to regulate the attendance and testimony of witnesses before a federal tribunal; and it requires as a condition of such attendance that constitutional privileges as socially significant as the First and Fifth Amendments to the Constitution of the United States be surrendered. "Appellants are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing . . . their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands . . . and although persons who reason superficially concerning such matters may find justification for extra-legal action to secure what seems to them desirable ends: this is not the American way of life." *American Medical Ass'n v. United States*, 130 F. 2d 233, 249 (C. A. D. C., 1942), aff'd 317 U. S. 519. ". . . the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of in-

terstate commerce, and provides extra-judicial tribunals for determination of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'" *Fashion Guild v. Federal Trade Commission*, 312 U. S. 457, 465. See also, *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600, 613; *United States v. United States Gypsum Co.*, 333 U. S. 364, 400; *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 808 (D. C. E. D. Pa., 1915).

Nor should it be overlooked that in thus assuming governmental powers with the sanction of the State, this combination is purporting to do what is forbidden to government itself. See, *Truax v. Raich*, 239 U. S. 33; *Wieman v. Updegraff*, 344 U. S. 183; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123; *Joseph Burnstyn, Inc. v. Wilson*, 343 U. S. 495; *Quinn v. United States*, 349 U. S. 155; *Watkins v. United States*, 354 U. S. 178, 1 L. ed. 2d 1273. "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interest." *Associated Press v. United States*, 326 U. S. 1, 20.

In addition, the inherent unlawfulness of this combination is heightened by the means used to obtain the objectives of this conspiracy. Coercion is used upon all employers in the industry [R. 36] and the blacklist is one of the prime weapons [R. 36]. The blacklist used here

shows the conspiracy "in action." The effect of this blacklisting of persons who have exercised their constitutional privileges in a federal tribunal is to subject them to punishment of a most severe nature—the loss of their livelihoods for acts not forbidden by law. Especially is the coercion, as well as the penalty, magnified through these blacklists when it is considered that the combination includes public officials [R. 34]. "The evil of blacklisting rests in the power wielded by a combination to exclude named persons from pursuing their occupations in certain regions or industries." Note, *Liability For Blacklisting Under The Prima Facie Tort Doctrine* in 51 Col. L. Rev. 398, 399 (1951).

In short, the respondents here are doing a great deal more than exercising their private rights; the combination is dictating to the petitioners; it is dictating to every employer in the industry; and it is bringing the pressure and oppression to bear on all parties by the use of the blacklist. "Blacklists are real instruments of coercion, as every man whose name is on one soon discovers." *Quinn v. Leathem,* (1901) A. C. (Eng.) 495, 538. No "unlawful combinations of capital, or unlawful combinations of labor" may be permitted under a government of laws to impose such a restraint upon the citizenry "whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter." *Gompers v. Bucks Stove & Range Co.,* 221 U. S. 418, 438. See also, *Eastern States Lumber Ass'n v. United States,* 234 U. S. 600, 609. All of this the State has countenanced in totally denying petitioners any relief.

Fourth, the motion picture producer respondents did not act alone; they conspired with members and employees

of a legislative committee acting both in their official and private capacities to forfeit the right to work and the political liberty of these petitioners. The Committee functioned as "lawmaker" by establishing the standards for employment in the motion picture industry; as "court" and "jury" by trying petitioners for their non-conformity to these standards and by declaring a sentence of excommunication from the motion picture industry upon petitioners. It remained only for the mandate to be executed and for this the Committee called upon the respondents for "cooperation." And not in vain. The axe was wielded and heads rolled. The decree was fully satisfied.

The respondents thus assumed the role of the Executive. They should not be permitted to escape its incidents. Here there is something akin in substance although different in form to what this Court referred to in *American Communications Assoc. v. Douds,* 339 U. S. 382, 401-2, when it said: ". . . and when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." The substitution of a fist for a thumb does not alter the principle.

In *Culp v. United States,* 131 F. 2d 93, private individuals conspired with state officers falsely to arrest citizens, incarcerate them and exort large sums of money from them as a condition of release. It was held that the state officials were obviously acting under "color of law"; that by conspiring with these officials private individuals assumed the same cloak; and that both the officials and private conspirators were guilty of a violation of 18 U. S. C. 52 [now 18 U. S. C. 242 (see Appendix A)] which is limited to acts under "color of law." In *Picking v. Penn. Ry. Co.,* 151 F. 2d 240, plaintiff sued certain

state officers and the defendant railroad charging a conspiracy under 8 U. S. C. 43 (a statute affording a civil remedy but otherwise similar to 18 U. S. C. 242, referred to above and dealing only with acts "under color of law") to deprive plaintiff of his liberty without due process of law, in which the defendant railroad "materially and physically participated" therein by acts "instigated and encouraged by all of the other defendants."[4] Although the railroad contended that the complaint should be dismissed against it because it was not an agency of the state, its plea was denied and it was held to answer as a co-conspirator. Here the motion picture respondents sacrificed their claimed status as simon pure private concerns and individuals when they conspired with a governmental agency to carry out its directives that the employees of the industry either conform with the Committee's standards or be exiled from the industry.

As was discussed above, *Marsh v. Alabama, supra,* treated private employers as in effect exercising state power in the absence of any conspiracy with government officials. In a subsequent case it was stated that the only difference between that case and *Marsh v. Alabama* was ". . . . Here instead of a private corporation, the federal government owns and operates the village. The difference does not affect the result." *Tucker v. Texas,* 326 U. S. 517, 519-20. Certainly where there is joint action of a governmental agency and of private interests the result should be no different.

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[4]A closer parallel would be difficult to find. Here the Committee instigated the acts of the corporation and other private respondents.

Fifth, the court below held that petitioners are entitled to no relief because they did not allege that they had actual contracts of employment or were in the process of obtaining such contracts in the motion picture industry. The complaint alleges that respondents by their conspiracy made it impossible for petitioners to negotiate contracts of employment in that field. Thus respondents are left in this enviable position: By their own wrong in excluding petitioners from any opportunity of obtaining any employment in the industry they create the condition which makes it impossible for the injured persons to secure relief. In the dissenting opinion of Chief Justice Stone in *Jones v. Opelika,* 316 U. S. 584, 600, 602-3 (later adopted as the opinion of the Court, 319 U. S. 103, 104), it was claimed that the petitioner, in order to have standing in court, should have applied for a license to distribute religious literature. The Chief Justice said with respect to this contention: "The Constitution can hardly be thought to deny to one subjected the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." Here the contention is even more strained. By their illegal conduct, the motion picture industry respondents have made it impossible for the petitioners to obtain any employment in the industry. Now they assert that petitioners have no standing to sue because they have no contracts. By making it impossible for you to obtain any employment at all, the argument goes, we have placed you in a position in which you cannot prove loss of a specific job;

by thus destroying your means of livelihood altogether, we make it impossible for you to prove any specific damages and we should be allowed to go our way with impunity to continue to decide who may and who may not have any opportunity whatsoever of earning his livelihood; moreover, we may do this for any purpose we choose, including the destruction of First Amendment rights.

The refusal of the state courts to grant relief rests on no better ground. The effect of the ruling is to establish a policy for the state that monopolistic combines have the right to deprive persons of any opportunity to contract because of their beliefs. The practical situation is actually no different than it would be if the state had adopted a statute declaring this rule. Even if we were to assume that such monopolistic combinations may be given the general power to determine who shall work in an industry, it does not follow that the right to exclude individuals as a means of controlling ideas could withstand the tests imposed by the Constitution. In the case of *Doyle v. Continental Insurance Co.*, 94 U. S. 535, it was held that a state might condition the doing of business within its borders by a foreign corporation upon the corporation's abstaining from use of the federal courts. Dissenting, Justice Bradley said: "The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, be-

cause I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property." (94 U. S. at 543-4). A commentator has said with respect to this decision: "The vice in an unconstitutional condition, in other words, is its tendency to bring about a forbidden result, interference with the federal judicial power in this case." "Invasions of the First Amendment to Conditioned Public Spending" by Alanson W. Wilcox, 41 Cornell Law Quarterly 12-23. *Terral v. Burke Construction Co.*, 257 U. S. 529, 532-3, overruled the *Doyle* case and established its dissenting opinion as law. The invalidity of the condition, said Chief Justice Taft, ". . . rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of th supreme fundamental law."

Here the exclusion of petitioners from the Courts has curtailed the free exercise of constitutional privileges and the right to work in derogation of the supreme law of the land. State action which results in such an exclusion is forbidden by the Constitution.

II.

The State Court Arbitrarily Denied Petitioners the Protection of Freedom of Speech and Association by Refusing Any Relief From the Monopoly Combination Which Conditioned the Right to Work on the Surrender of These Essential Liberties Thus Depriving Petitioners of Their Liberty and Property Without Due Process of Law in Violation of the Due Process Clause of the Fourteenth Amendment.

A. The duty of the state court to protect the petitioners' constitutional right to work is supplemented and buttressed by its obligation to protect their freedom of speech and association. The deprivations of petitioners' freedoms have a common source and join to submerge simultaneously petitioners' rights of property and of conscience, all of which the state in its dismissal of the complaint legalized and approved.

The petitioners refused to "surrender [to the Committee] their constitutional rights and privileges"; they would not "disclose their own [or others'] political affiliations, associations and beliefs" thus "maintaining a political principle of Freedom of political association, affiliations and beliefs" which they believed "protected by the Constitution of the United States." [Complaint, Para. VII, First Cause of Action, R. 37, incorporated by reference in each of the other Counts, R. 38.] These petitioners, who thus sought to maintain their constitutional rights against what they believed to be arbitrary governmental action, were the objects of a conspiracy which excluded them from all employment in the industry to which they had devoted years of labor and in which they had achieved high esteem and "reputations for excellence of

work." [Complaint, Para. II, of each cause of action. R. 29.]

This total exclusion from a common occupation constituted a wrongful taking of property rights; such exclusion, because it was directed at the maintenance of political beliefs, aggravated the wrongful taking by its trespass into the realm of the mind. A purposeful design, not happenstance, was responsible for this multiplication of evils. The "purpose of the conspiracy" was "to limit, control and direct the political activities" of employees in the motion picture industry in such a manner as to cause them to "refrain from adopting or following any course or line of political action and activity not acceptable to [said] Committee". Threats "of discharge and loss of employment", with petitioners as the object lesson, were the means adopted to achieve the desired conformity. An admitted added purpose of the conspiracy was to "limit the production of motion pictures . . . to those the content of which is acceptable to the said Committee." [Complaint, Para. VII, First Cause of Action, R. 37.]

All this the complaint alleges and the demurrer, for the purpose of this proceeding, admits. But the courts of California by their application of the doctrine of judicial notice have taken this case outside the restrictions of the four corners of the pleadings. What the parties have actually done in relation to the matters alleged is largely recorded in official proceedings which, to the extent that they are relevant, may be considered as part of the pleadings. These official proceedings, discussed in detail in the statement of the case, reveal a program for thought control in the motion picture industry, embracing both its products and its human instruments, which was initiated by the Committee and was brought to ful-

fillment by joint action between it and the Motion Picture Respondents.

This particular program has been part and parcel of a program directed by the House Committee on Un-American Activities at virtually every aspect of American life.[5] ". . . From time to time the Committee has concerned itself with such matters as the content of Hollywood films, the programs of radio news commentators, and the text-books used in American schools. In most of these instances the Committee's chief purpose has seemed to be the establishment of patterns of American, as against un-American, activity which would be controlling in the development of our national life, public and private." Robert K. Carr, "The Un-American Activities Committee", 18 U. of Chicago, L. R. 598, 599-600.

As long ago as 1947 Judge Clark dissenting in *United States v. Josephson*, 165 F. 2d 82, 95, pointed out that the Un-American Activities Committee has investigated "The American Civil Liberties Union, the CIO, the National Catholic Welfare Conference, the Farmer Labor Party, the Federal Theater Project, Consumers Organization, various publications from the magazine 'Time' to the 'Daily Worker'. . . . ." The Committee set itself no less a task than "to set the standards of American thought and conduct with respect to orthodoxy and heresy in politics", Carr, *supra*, at p. 599; *Cf.* Paul J. Liacos, "Rights of Witnesses Before Congressional Committees", 33 B. U. L. R. 337, 361-2; Robert C. Cushman, "Civil Liberty

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[5] ". . . But the experience of this Committee's activities now for nearly a decade is instructive in the contrary direction, that is, as showing that there are no bounds to its asserted and exerted powers"—the dissenting opinion of Judge Clark in *United States v. Josephson*, 165 F. 2d 82, 93, 95.

and Public Opinion; in Safeguarding Civil Liberty Today", Bernay's lectures of 1944 at Cornell University 81[6]; Dembitz, "Congressional Investigation of Newspapermen, Authors and Others in the Opinion Field—Its Legality Under the First Amendment", 40 Minn. L. R. 517. Among the viewpoints which the Committee from its early days has included in its schematism of un-Americanism are "opposition to the American system of checks and balances, opposition to the protection of property rights, belief in dictatorship, opposition to the Franco government of Spain, opposition to General MacArthur, advocacy of a world state, advocacy of the dissolution of the British Empire, criticism of members of Congress, and criticism of the Committee on Un-American Activities." *Barsky v. United States*, 167 F. 2d 241, 257; Edgerton, J., dissenting, citing Note, "Constitutional Limitations on the Un-American Activities Committee", 47 Col. L. Rev. 416, 418, 422-3.

That the Committee's hearings have been concerned with matters other than legislation is virtually self-evident. The scope and standards established for itself by the Committee are irreconcilable with the assurance of the First Amendment that in this land beliefs and associations are for each individual to determine for himself according to his own conscience. This Committee has never explained how an unlimited examination into ideas and associations protected by the First Amendment could possibly be in aid of legislation. To the contrary, it has

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[6] "By the skillful use of labels, or slogans, American public opinion was innoculated with the dangerous idea that true Americanism consists in the stalwart defense of the *status quo* and the suppression of those dangerous and disloyal people who are unpatriotic enough to want to criticize it or suggest any change in it." *Ibid.*, at p. 100.

asserted a different objective: "As contrasted with the FBI and the grand jury, the House Committee on Un-American Activities has a separate and a very special responsibility. It functions to permit the greatest court in the world—the court of American public opinion—to have an undirected, uncensored, and unprejudiced opportunity to render a continuing verdict on all of its public officials and to evaluate the merit of many in private life who either openly associate and assist disloyal groups or covertly operate as members or fellow travelers of such organizations. It is as necessary to the success of this committee that it reveal its findings to the public as it is to the success of the FBI that it conceal its operations from the public view. . . ." Interim Report on Hearings Regarding Communist Espionage in the United States Government, 80th Cong. 2d Sess. (1948).

Former Representative (now Senator) Mundt has stated on the floor of the House that the function of the Committee is to expose, publicize and furnish information to the American people. 92 Cong. Rec. 367 (1946). See also, Statements of Representative Dies, 83 Cong. Record 7570 (1938); of Representative Rankin, 91 Cong. Record 275 (1945); and H. Rep. No. 2742, 79th Cong., 2d Sess. 16 (1947).

The result of this program could be no surprise. "People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak. . . ." dissenting opinion of Judge Edgerton, *Barsky v. United States*, 167 F. 2d 241, 252, 255. The Committee ". . . invites and justifies an attempt to enforce conformity of political thinking, to penalize the new and the original, to label as subversive or un-American the attempt to devise

new approaches for the public welfare, in short to damn that very kind of initiative in experimentation which has made our democracy grow and flourish." Dissenting opinion of Judge Clark in *United States v. Josephson*, 165 F. 2d 82, 93, 95, 97.

The full measure of the Committee's program to dam up the free flow of public opinion requires an examination of its blacklisting activities. The importance which the Committee attributes to this phase of its activities accounts for its never-ceasing hunger for names, names and still more names. "Subversive" individuals mark as "subversive" the organizations to which they belong. No surer sign of "subversion" is available than membership in a "subversive" organization. Each feeds upon the other as the lists grow.

The year 1948 found the Committee with a compiled filed index and information on 500,000 individuals plus an undesignated number of organizations; some insight as to the number of listed organizations is available from the facts that there were 380 organizations listed under the first letter of the alphabet alone, and that reports of investigators referred to 15,825 organizations. Reports on 25,591 persons and 1,768 organizations had been prepared for members of Congress alone.[7] Governmental agencies of all kinds had made 5,985 separate examinations of Committee files (Committee Report, D. c. 31, 1948, pp. 21-24).

From this beginning, the Committee has moved on at a rapid rate. One year later the number of individuals

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[7] No information is available as to the extent to which this information reached private individuals or entities. But see charge of Representative Voorhies that information was used for attacks on citizens by Congressmen.

listed had been increased by 170,000. In that year government agencies resorted to the files in 3,956 separate occasions, and there was an accumulation of more than one million documents and records in the Committee's files. (Committee's Annual Report, 1949, pp. 18-21.)

In 1950 the Committee's files were supplemented by 200,000 additions and the tempo of the reported use of its files continued unabated. (Committee's Annual Report, 1950, pp. 40-43.)

In 1951 the estimated number of names in the files had leaped to 750,000 and the use of files had increased by more than 50%. (Committee's Annual Report, 1951, pp. 24-26.)

By the end of 1952 the number of individuals dossiered by the Committee totalled not less than 840,000 (Committee's Annual Report, 1952, pp. 77-79.) In 1957 the Committee issued a revised "Guide to Subversive Organizations and Publications" adding 181 organizations and publications to the 391 labelled as subversive in a similar "Guide" released by the Committee in 1951. Obviously no individual who or organization which fails to conform to the Committee's concepts of Americanism is immune from its assaults.

This "information" has been utilized for many purposes, not the least of which is the driving of "subversives" from jobs considered "critical" by the Committee, cooperating for this purpose with private employers as well as government agencies, state and federal. Gelhorn, "The States and Subversion" (1952), pp. 68-9. Barrett, "The Tenney Committee", pp. 27-29, n. 1, 280, Chap. 11, New York Times, July 14, 1955, p. 1, Col. 3; *Ibid.*, Jan. 5, 1956, p. 32, col. 2; *Ibid.*, June 5, 1956, p. 1, col. 2, Carr, "The House Committee on Un-American Activities 1945-

1950", pp. 253-61, Chap. 10, Taylor, "Grand Inquest", pp. 80-81.

The question whether the Committee engages in blacklisting has been answered by another question: "How can the committees be otherwise understood when they make clear that suspected pro-Communists should be discharged from jobs and removed from opportunities where they can disseminate their views, and in fact that suspicion will attach to anyone who tolerates them in opinion-influencing positions?" Dembitz, *supra*, 40 Minn. L. R. at 523; see fn. 23 for examples; see also, Note "Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation", 65 Yale L. J. 1159, 1189 (1956). A file of more than one million names of persons and organizations has been gathered for the avowed purpose of driving "subversives" out of private and government employment. ". . . Here there can be no doubt of that intended and actual consequence of the investigation. The Committee announces its desire that the persons it finds guilty shall forfeit their jobs in public and private industry. . . . * * * There can be no doubt of the obvious and direct abridgment of the right freely to speak and express one's opinions which is thus achieved." *United States v. Josephson*, 165 F. 2d 82, 93, 95, 100, Clark, J., dissenting.

The over-all program of the Committee has had certain concentration points. Foremost among these has been the motion picture industry. In that industry the Motion Picture Respondents have joined hands with members of the Committee to effectuate its objectives. It is this conspiracy (to mould to the fashion patterned by the Committee the content of motion pictures and the speech and associations of those who earn their livelihood making

motion pictures—to be achieved by the simple device of black-listing all who fail to conform—) that is charged in the complaint dismissed by the State Court.

B. In assessing the impact upon this case of the impingement upon the liberties secured by the First Amendment, it is not essential to debate whether those freedoms occupy a preferred position in the constellation of constitutional principles. That the illumination of the entire system depends in large measure on the light which only free expression of ideas can cast upon it has never been doubted. Because of this it has sometimes been said that there is a ". . . preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment". *Thomas v. Collins*, 323 U. S. 516, 524-30. These "fundamental rights and liberties" which lie "at the foundation of free government by free men" (*Schneider v. Irvington*, 308 U. S. 147, 161) demand the correction of "any action of the Government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean v. American Press Co.*, 297 U. S. 233, 249-50 (1936), quoting from 2 Cooley Constitutional Limitations 886 (8th Ed., 1927).

When dealing with property rights, a state, without violating the due process clause of the 14th Amendment, may impose such restrictions as can be rationally supported. The power of a state, consistently with due process, to foster a restriction upon freedoms of expression is another matter. "They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *West Va. State Bd. of Educ. v. Barnett*, 319 U. S. 624, 639. *Cf. Thomas v.*

Collins, Mr. Justice Jackson concurring, 323 U. S. 516, 544, 545. Departure from this guide post leads to the path of abandonment of the thesis that free speech, press and assembly are essential to our governmental processes ". . . . in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *DeJonge v. Oregon,* 299 U. S. 353, 364-5.[8]

In this case the attack upon constitutional liberties has been waged from many points. Always in the main line of fire, however, has been the right of political association. This strategy is supported by a vast history of the experience of free men and of men fighting for freedom. The political freedom of the individual is dependent upon his right of association with others. If free political association is destroyed, the ability to communicate is undermined at its weakest point and all other freedoms can be quickly routed.

"Exercise of these basic [First Amendment] freedoms in America has traditionally been through the media of political associations. Any interference with the freedom

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[8]"Too often free speech is discussed only in terms of the rights of the individual. That is not by any means the whole story. At stake is our collective political birthright. For it is one of the pre-suppositions of democracy that men will speak their minds; it is one of the conditions of democracy that all sides of the public questions will be heard. Hence it is one of the obligations of citizenship to speak out for what one believes. Thus, over the years, is error best combated; such is the democratic thesis." "Freedom of Inquiry v. Authority" by Joseph O'Meara—Dean of the Notre Dame Law School. 31 Notre Dame Lawyer 3, 10.

of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity of minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society."[9] *Sweezy v. New Hampshire,* 354 U. S. 234. It is because freedom of speech, press, assembly and petition are interdependent that they are "coupled in a single guaranty." *Thomas v. Collins,* 323 U. S. 516, 530.

Here the conspiracy of the respondents threatens all of these rights. In effect the respondents have set themselves up as censors of the motion picture industry and of all those who have or desire employment therein. The Committee has decided what beliefs are good for the government and which are bad. The respondents seek within the motion picture industry to promote the former and suppress the latter. This falls within the definition of censorship as: ". . . the policy of restricting the public expression of ideas, opinions, conceptions and impulses which have or are believed to have the capacity to undermine the governing authority of the social and moral order which the authority considers itself bound

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[9] "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." De Tocqueville, Alexis, *Democracy in America* (New York, 1946), Vol. X, p. 196.

to protect." Harold D. Lasswell, Censorship, Encyclopedia of the Social Sciences (New York, 1930), III, 290.[10] As has been stated by Paul L. Liacos in "Rights of Witnesses Before Congressional Committees", 33 B. U. L. 337, 385, 386, ". . . our system of government is structured on the belief that the ultimate public interest lies with the protection of the most unpopular dissenter. The fact that some congressional committees have by intimidation and public pressure encouraged orthodoxy of views is the most damning criticism of the investigative committee." It is the function and duty of courts to stand as "havens of refuge" for *all* who are victimized because of their nonconformity. *Chambers v. Florida,* 309 U. S. 227, 241.

In using its powers so as to defeat that function and duty, the California Court disregarded the command of the 14th Amendment. The damage flowing from this action fell not upon these petitioners alone. Conformity has become the *sine qua non* for survival in the motion

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[10]Nor would it lessen the evil if it were true that the Committee with the aid of the motion picture respondents sought merely to eliminate a small group of dissenters totally lacking in public support. Epithets applied to these petitioners should not be permitted to conceal what is at stake here. Treason or some synonym for treason has been the battle cry of this Committee. This weapon used against men who dare to differ is an ancient one. A prevalent theme in Greek literature, as for example in Euripides' "Palamedes" is one in which the true wise man is falsely accused of treason and condemned to death. The pain in the lines of the chorus echo through the ages "Ye have slain, ye Greeks, ye have slain the nightingale; the winged-one of the Muses who sought no man's pain.", a reference supposedly to Protagonus who was accused of "atheism" and forced to flee Athens for saying "Man is the measure of all things." Gassner, Masters of the Drama, New York, 1940, p. 69. Murray, Euripedes and His Age, New York, pp. 57, 137-8. Winspear, The Genesis of Plato's Thought, Russell, New York, 1956, p. 140. It may well be asked whether there is any high principle that we cherish today which at some time in the past has not suffered the label of heresy or treason.

picture industry. Other channels of communication have been subjected to similar pressures. And the impact has not stopped there. What the Committee has done in this industry is possible elsewhere. If one desires security in his job, it becomes prudent not to say anything of which the Committee might disapprove. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U. S. 88, 97.[11]

"The people, not the government, possess the absolute sovereignty." *Report on the Virginia Resolutions* (Elliot's Debates, Phil. 1836, 2nd Ed., Vol. IV, p. 569). In modern society a free people can exercise sovereignty, the source of their freedom, only by full and free discussion

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[11]The Committees obviously exert an influence against the free and unabashed scrutiny of ideas envisaged by the first amendment, insofar as they discourage appraisal of political ideas on their merits and encourage acceptance of what appears government-approved and safe. . . .

". . . The tendency of investigations in this field as presently conducted is, therefore, we submit, to guide the public towards an orthodoxy of ultra-nationalism, and to cause avoidance of any speaker or writer who does not demonstrate by his avowal of such a viewpoint that he is free from taint or suspicion.

"The Committees' work seems analogous to the establishment of a system of censorship which has the 'pervasive' effect of discouraging any composition that is not certain of the censor's approval. See Thornhill v. Alabama, 310 U. S. 88, 98 (1940).

"It hardly needs laborious demonstration to show that the committees' treatment with suspicion of a group of political ideas, tends to make non-Communists who are concerned with protecting their reputations, influence, or positions, hesitant and fearful about expressing a political opinion that may appear to fall in the suspect class." Nanette Dembitz, "Congressional Investigation of Newspapermen, Authors and Others in the Opinion Field—Its Legality and the First Amendment" 40 Minn. L. R. 517, 528, 531.

of all issues, as an indispensable aspect of participation in the political process.[12] The representatives of the people have the right and obligation to contribute to that discussion but not to seek to control it by coercive measures. Such control would convert the representatives into the masters of the people. Sovereignty would change places and freedom would be destroyed in the process.[13] This would be the penalty for forgetting that "Authority here is to be controlled by public opinion, not public opinion by authority. . . ." *Schneider v. State of New Jersey*, 308 U. S. 147, 161.

It is for this reason that: "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. . . .". *Roth v. United States*, 354 U. S. 476, 488.

To give free run to a private self-anointed super government within an industry working in conspiracy with members of a Congressional Committee is to throw the door

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[12] "These judges know that statutes, to be sound and effective, must be preceded by abundant printed and oral controversy. *Discussion is merely legislation in the soft. Hence drastic restrictions on speeches and pamphlets are comparable to rigid constitutional limitations on law making.*" Chaffee, "Free Speech in the United States", pp. 360-361 (emphasis added).

[13] "Libarnius says, that at 'Athens a stranger, who intermeddled in the assemblies of the people, was punished with death.' This is because such a man usurped the rights of sovereignty." (Montesquieu, Spirit of Laws (Cincinnati, 1873), Vol. 1, p. 10.)

wide open to destruction of constitutional liberties and to abandon the safeguards fashioned by the Constitution for the people's sovereignty.

C. The right of each individual to freedom of belief, speech and association is a matter of high moment. Loss of such freedom to anyone threatens a chain reaction, the end result of which extends far beyond its starting point. When the original perpetration is directed against persons whose work is in the field of art, culture and ideas, the danger is heightened. For then, not only individuals, but an entire area of communication may be rendered sterile. Here the object and impact of the suppression relate directly to the content of motion pictures and the expressed beliefs of those engaged in their production.

There is no justification for excepting motion pictures from the guarantees the Constitution affords to freedom of expression. *Burstyn v. Wilson*, 343 U. S. 495, 503. Mr. Justice Frankfurter's concurring opinion, joined by Mr. Justice Jackson and Mr. Justice Burton, notes that the effect of the New York censorship statute tested in the *Burstyn* case is to permit pressure groups to determine what is "sacrilegious" and therefore what may or may not be shown. ". . . Consequently the film industry, normally not guided by creative artists, and cautious in putting large capital to the hazards of courage, would be governed by its notions of the feelings likely to be aroused by diverse religious sects, certainly the powerful ones. The effect of such demands upon art and upon those whose function is to enhance the culture of a society need not be labored." *Ibid.*, 343 U. S. at 532.

Here "the film industry" has entered into a conspiracy with members of the Committee to bar non-conformists (upon the basis of claimed political beliefs, rather than

religious commitments) from the creative process of picture making and to control the content of motion pictures to meet the standards of the Committee members. Certainly, "[t]he effect of such demands upon art and upon those whose function is to enhance the culture of a society need not be labored."

Freedom promotes art and culture, for it is their natural environment. Freedom without a flourishing of arts and letters is virtually a contradiction in terms. To strike at these media of communication is to threaten the jugular vein of democracy. Free Speech in the United States, by Zechariah Chafee, Jr., 1946, 17, 28-30, 154, 366, 545. In this era, the motion picture is a cultural art form which reaches and influences with considerable frequency great numbers of the American people. The handicaps upon its artistic and cultural content which result from the commercial interests of those who invest their money in the production of motion pictures are well known. This is not a problem with which the judiciary can grapple. However, its existence highlights the importance of eliminating any restraints which the law condemns.

The right of an individual business enterprise to make the kinds of motion pictures which in its best judgment are calculated to return the highest profits and to hire personnel with the qualifications necessary to that end is not challenged here except by the combination of respondents. Petitioners complain of a combination of business enterprises, which collectively dominate the motion picture industry, when they act with members of a Congressional Committee for the purpose of controlling the content of all motion pictures and of determining the political qualifications of all persons employed in the industry. Any attempt to equate this with the right of the individual pro-

ducer to run his business in the manner he deems in his best interests is to denominate opposites as equivalents. The effect of the conspiracy is to prevent individual determinations designed to promote competition for the best product. Experimentation with new or controversial ideas and subjects is discouraged. Competition in ideas is stifled.[14] A censor hovers over the work of every artist in the industry. The individual creativeness which is one of the highest goals of a free society is repressed. Ignored is the warning once given by two members of this Court. "In this nation every writer, actor, or producer, no matter what medium of expression he may use should be freed from the censor." *Superior Films v. Dept. of Ed.*, 346 U. S. 587, 589, Mr. Justice Douglas and Mr. Justice Black concurring.

Book-burning can find few defenders in this land. To destroy a work of art or of culture or of any expression of ideas is abhorrent. But men whose books have been burned have gone on to write other books and copies of those put to the fire have always survived the flames of bigotry. But what of the loss to society because of books that have never been written because the writers have been burned or their continued creation of books in some other fashion rendered impossible?. No individual may have the right to demand of society that his works be published. But unless every one is given an opportunity to have the products of his mind complete for publication

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[14]The character of attack upon ideas has been illustrated in the dissenting opinion of Judge Clark in *United States v. Josephson*, 165 F. 2d 82, 93, 95, at 96: ". . . As a matter of fact, the testimony at the recent movie investigation found that the necessary un-American qualities for which the Committee was searching in films which placed bankers in an unfavorable light or talked 'against the free enterprise system.'"

with those of all others, books are destroyed with even greater finality than if they are burned after having been committed to paper and the printing press.[15] And so it is with every form of expression, including motion pictures.

Here censorship achieves its highest mark. These petitioners have been barred from any opportunity to engage in creative activity in their chosen field. Their works will never be burned—nor evaluated on their merits. The issue sharply presented here is whether a state may sustain such action by a conspiracy of producers controlling the production of motion pictures acting in concert with members of a Congressional Committee;—by establishing a rule of law that individuals who do not have contracts in their pockets or close at hand may have their freedoms thus abridged with the consequent loss to the nation.[16]

D. The arbitrary methods pursued by the Committee in initiating the process of punishment and by the motion picture respondents in its execution further compound the evils granted sanctuary by the dismissal of the complaint herein.

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[15]In the seventeeth century George Fox, founder of the Quakers, upon refusing to swear any oath, was given a Bible; he held it in his hand saying "How come it that the Book is at liberty amongst you . . . and yet ye imprison me for doing as the book bids me?' Why don't ye imprison the book?" The Journal of George Fox, prepared and edited by Norman Penney, N. Y. 1924.

[16]The motion picture industry will not alone be affected by the principles declared in this case. It is but one of many special areas of our national life in which reasoned tenderness for our freedom takes on a significance even greater than that which it merits in every nook of our society. *A Free and Responsible Press*, University of Chicago, 1947, pp. 6-7); *Sweezey v. New Hampshire*, 354 U. S. 234, 266; *Wieman v. Updegraff*, 344 U. S. 183, 194, 194-5; *Konigsberg v. State Bar of California*, 353 U. S. 252.

The petitioners have been deprived by respondents' conduct of rights the value of which rank high to them as individuals and which cast their protective cloak about all of the people. Procedural due process is a prerequisite to a taking of such rights even if it were otherwise constitutionally permissible. Any test to determine the sufficiency of procedural due process, particularly where the "livelihood" of individuals is affected thereby, which ". . . has regard to the mere form of the proceedings and ignores reality" does not measure up to the requirements of the Constitution. *Morgan v. United States*, 304 U. S. 1.

This principle was followed in *United States v. Lovett*, 328 U. S. 303, where Congress in certain appropriation bills provided that no monies should be used to pay the salaries of three named individuals. It was held by this Court that there was thus accomplished "the punishment of named individuals without a judicial trial"; this method of "cutting off the pay of certain named individuals found guilty of disloyalty" without the safeguards of a judicial trial is within the proscriptions of the due process clause. 328 U. S. at 316. *Cf. Kilbourne v. Thompson*, 103 U. S. 168, 182. Congress was thus prevented from circumventing the Bill of Rights. What the Constitution forbids to Congress as whole may not successfully be asserted, it is now clear, as a prerogative of one of its Committees. "The Bill of Rights is applicable to investigations as to all forms of governmental action. . . ." *Watkins v. United States*, 354 U. S. 178; *Sweezey v. New Hampshire*, 354 U. S. 234; *United States v. Rumely*, 345 U. S. 41, 97; *Cf. Kansas v. Colorado*, 206 U. S. 46, 81.

The punishment which these petitioners have suffered was preceded by none of the procedures embodied in due

process as the fundamental ideas of fair play and justice in civilized society. *Cf. United States v. Lovett,* 328 U. S. 303, 317-18; *In re Oliver,* 333 U. S. 257, 273. Petitioners were given no notice that they were charged with any offense; in truth they were charged with none except in the vernacular of the Committee. They were given no day in court—no opportunity to present any defense. Cross-examination was denied to them as was any meaningful right of counsel. The Committee was the legislature for it established the standards of wrongdoing, and it was also the prosecutor, judge and jury all rolled into one.[17] Only the function of executioner was left to the motion picture respondents, whose private status merely multiplied the evils arising out of such an assumption of a governmental function. Banishment from their means of livelihood was the sentence carried out, one to which the label of "cruel and unusual punishment" might appropriately be applied. The Committee members now assert the immunity of government officials; the motion picture respondents that of private business. Neither may be allowed to escape responsibility for their usurpation of power as long as the Fourteenth Amendment and the Bill of Rights retain their vitality.

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[17]This far exceeds the "aggregation of powers and inherently concomitant denial of historic freedoms" condemned by Mr. Justice Rutledge concurring in *Re Oliver,* 333 U. S. 257, 278, 279. Small wonder then that

> ". . . Some witnesses have felt that they have been abused, denied traditional constitutional protections, and irresponsibly villified and slandered by or before congressional committees. . . . . The abuses of certain congressional committees have been pointed out as demonstrating the need for reform and restraint. The unfairness of some committees in dealing with witnesses has brought forth pleas for procedural reforms and limitation of the investigative power. . . . ." Paul J. Liacos, Rights of Witnesses Before Congressional Committees, 33 B. U. L. R. 337, at 338.

The danger implicit in legislative inquiries not clearly limited to appropriate legislative objectives has been perceived by eminent authority.

> "Not only does the logic of the legislative needs call for a strict limitation of this power, but also the policy of the situation; for the Legislatures are not bound by, and do not employ, the evidential rules that in judicial trials protect parties and witnesses and check abuses of power * * *. Moreover, legislative inquiries are sometimes conducted for partisan purposes and personal aggrandizement, and there is a particular temptation to pursue the inquiry beyond the necessities of contemplated legislation and to assume improperly the function of a grand jury." 8 Wigmore, *Evidence* (3d ed.), Section 2195.

The very resolution creating the Committee renders appropriate this warning against abuse of power. "It would be difficult to imagine a less explicit authorizing resolution", in the light of the history of the Committee. "No one can reasonably deduce from the charter the kind of investigation that the Committee was directed to make". *Watkins v. United States*, 354 U. S. 178, 202, 204. *Cf. Harriman v. Interstate Commerce Comm.*, 211 U. S. 407, 420. Any person professing a point of view which displeases the Committee is answerable to it. "In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Thomas v. Collins*, 323 U. S. 516, 535.

The precise technique by which such a result is achieved merits consideration. The Committee assures the people that its function is to let them know the facts so that they can determine in an informed manner the course of action to be pursued in combatting "subversion." Explicity at times, implicitly at others, the Committee de-

clares that once its share of the responsibility has been met, it is the obligation of the public and of industry particularly to excommunicate the Pariahs the Committee has germinated.

The pattern thus fixed, the Committee "exposes"; then the motion picture industry disposes. The motion picture respondents' position is that this exposure has brought these individuals into disrepute with the general public; if anyone in the industry continues to employ any person so exposed by the Committee, it will injure the industry which needs public good will in order to make money; accordingly the entire industry must combine to prevent any person labelled "subversive" by the Committee from securing any employment in the industry.[18] What these respondents have thus asserted must be done has been done.

To evaluate this position it is necessary first of all to consider whether the power of "exposure" is possessed by the Committee. For it is probable that even the respondents would not claim the right to execute the sentence of a Kangeroo Court in the belief that public acclaim might thus be won and profits increased.

The "right to be exempt from all unauthorized, arbitrary or unreasonable inquiries or disclosures in respect of . . . . personal and private affairs" has long been recognized as one among those most valued by the people. *Sinclair v. United States*, 279 U. S. 263, 292. *Cf.* Mr. Justice Brandeis dissenting, "The makers of our Constitution . . . conferred as against the Government,

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[18]At other times in our history the industry might have sought to justify identical action if the investigation "exposed" Negroes, Jews, Catholics, the Irish, or Masons!

the right to be let alone—the most comprehensive of rights and the most valued by civilized man." *Olmstead v. United States*, 277 U. S. 438, 478. In more recent times this Court observed the fact that exposure, as for example, by requiring members either of particular religious denominations or of political parties to wear identifying armbands, cannot be distinguished in its effect upon First Amendment guarantees from "imprisonment, fines, injunctions or taxes." *American Communications Assoc. v. Douds*, 339 U. S. 384, 402. The unpronounced premise of the decision in *United States v. Rumely*, 345 U. S. 41, is that the process of exposure by an investigative committee inhibits free speech. *Dembitz, supra*, 40 Minn. L. R. 517, 542. That premise has now been clearly announced as a principle directly applicable to the Committee. In *Watkins v. United States*, 354 U. S. 178, 200 2d 1273, 1291, the addiction of the Committee to "exposure" as the focal point of its functions is demonstrated by its own official declarations. Distinction is then drawn between exposure of the workings of government and exposure of citizens. The rights and duties of Congress with respect to the former "cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals."

As Mr. Chief Justice Warren said in the *Watkins* case: "The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference." 354 U. S. 197. When this is done in an atmosphere sometimes comparable to a Roman circus, aided and abetted by the multitudinous and all-embracing forms of modern communication, the degree of interference expands both in intensity and scope. Add to this the Com-

mittee's practice of condemning as subversive or traitorous the associations and beliefs of the witness, actual or alleged, according to the Committee members' predilictions, and the vise designed to press prevailing beliefs into a pattern of conformity tightens. Yet this is not all. The Committee presses its advantage; calls for the ostracism and blacklistings of "unfriendly witnesses", sometimes overt, sometimes subtle, come from the Committee members. But the Committee alone cannot deal the final blow. Here the motion picture respondents acting in conspiracy with the Committee members perform the coup de grace. Nor is any guilt or guilty knowledge on the part of the victim a prerequisite for the punishment inflicted. *Cf. Sweezey v. New Hampshire, supra,* 354 U. S. 234, 246; *Wieman v. Updegraff,* 344 U. S. 183.[19]

The Committee's assumption of power over ideas gathers strength as its objectives are thus achieved. Each new victim adds muscle-tone to its processes and redoubles the need for new victims. "This kind of evil grows by what it is allowed to feed on." *Sweezey v. New Hampshire, supra,* Mr. Justice Frankfurter and Mr. Justice Harlan concurring, 354 U. S. at 263. The power of the Committee varies directly with the degree of injury those it exposes suffer. The greater the injury the greater the fear emanating from the Committee's activities; the greater the fear, the higher the degree of conformity secured; the higher the degree of conformity, the greater the power of the Committee to inflict injury. And so on in an ever-widening and deepening circle.

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[19] "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." 344 U. S. at 191.

It is the motion picture respondents' participation in the conspiracy which makes possible the imposition of the injury of loss of all employment opportunity in the industry. Additionally, the blacklisting in the motion picture industry inevitably jeopardizes employment opportunities everywhere. The consequences to the individual are comparable to those "visited upon a person excluded from public employment on disloyalty grounds." *Wieman v. Updegraff, supra*, 344 U. S. at 190. *Cf. United States v. Lovett*, 328 U. S. 303, 316.[20] The framers of our Constitution understood full well the coercive power subsumed in the ability to inflict monetary loss; to secure the independence of the judiciary they provided that no judge's compensation might be reduced during his term of office. See *O'Donoughue v. United States*, 289 U. S. 516, 531, where the Court quotes Alexander Hamilton: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" (Court's emphasis.) Power over the will of the citizenry is the goal of this conspiracy and the combination here existing has exercised one of the most effective means of attaining it.[21]

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[20]This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason." *United States v. Lovett*, 328 U. S. 303, 316.

Is permanent exclusion from an industry to which years of work have been devoted and in which a high degree of preeminence has been obtained any less galling?

[21]History is replete with examples of attempts to control beliefs by affording dissenters the choice between following their professions or chosen callings while eschewing the expression of troublesome thoughts or of accepting exile from their professions

In the *Watkins* case, it was held that the fact that the impact ~~upon~~ First Amendment liberties resulted partially from non-governmental activity of private persons did not relieve the investigating committee of its responsibility for "initiating the reaction". 354 U. S. at 198. Here the private entities joined hands with an agency of government and exercised their power over an entire industry in such a manner as to destroy all opportunity for the realization of their talents in that industry by any petitioner, all as a means of spreading a blanket of conformity over the industry and the individuals in it or desiring access thereto. The motion picture respondents seek to escape responsibility because the Committee initi-

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and callings and, ofttimes, from their countries. Plato paid the price of exile for his defense of his teacher Socrates; upon his return to Athens and the founding of the Athenian Academy he found it necessary to explain that he would avoid any participation in politics. Plato, Seventh Letter in Epistles; Plato, Bury's Translation, Harvard, Rev. 1952, Vol. VII, pp. 463-509.

More widely known is Galileo's forced recantation before the Inquisition than are the problems he found in earlier years. In 1493, he had to resign his professorship at the University of Pisa after he began his study of dynamics by dropping objects from the leaning tower of Pisa. (Levinger, Galileo, N. Y. 1952, pp. 25-34.) He was able to obtain and retain employment at the more liberal University of Padua at the price of keeping his theories secret (*ibid.* p. 51), as he wrote to his friend, the German astronomer, Johann Kepler, who shared Galileo's Copernican views of the universe. As always, the impact of suppression corroded the avenues of inquiry. Thus Galileo tells how frightened a group of scientists were when he tried to show them Jupiter's moons through the telescope; Baumgardt, *Johannes Kepler, Life and Letters*, New York, 1951, p. 86: "What do you say to the main philosophers of this school, who, with the stubborness of vipers, never wanted to see the planets, the moon or the telescope, although I offered them a thousand times to show them the planets and the moon. Really, as some have shut their ears, these have shut their eyes toward the light of truth."

Efforts to proscribe thought and association by economic outlawry have not always succeeded. In the beginning of the 18th century the "Occasional Conformity Bill" was defeated in the English Parliament and proscriptions against employment of religious

ated the reaction which they carried to its full fruition. Just as the Committee cannot escape responsibility by pointing a finger at private individuals, the motion picture respondents should not be allowed to avoid liability by sloughing off their responsibility on the Committee.

In a case arising out of an indictment under 18 U. S. C., Sec. 52 [now 18 U. S. C. 242 (see Appendix A)], making it a criminal offense to injure or destroy rights secured by the Constitution, it was charged that state officers formed and led a posse of civilians in pursuit of a Negro, without process or lawful cause, and "requested and directed" the civilians to shoot to kill this Negro, which they did. The assertion that "the acts complained of

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dissenters received a set-back. (*Select Documents for Queen Anne's Reign, Down to the Union with Scotland, 1702-1707*, selected and edited by G. M. Trevelyan, Cambridge, 1929, pp. 24-40.)

This nation has not been exempt from similar invasions of personal liberties. During a period beginning about 1827 there was a period of hysteria against Masons. Niles Weekly Register for March 21, 1829, reported that influential Masons found their businesses and professions so jeopardized that they recommended abandonment of chapters and lodges. Hammond, "The History of Political Parties in the State of New York", Vol. II Buffalo, 1850, pp. 369-375. In the next two decades the attack shifted. "'No Irish need apply' was a common sign on workshops and counting rooms." Samuel Eliot Morrison and Henry Steele Commanger, "Growth of the American Republic", Vol. I, New York 1942, p. 502.

The history of discrimination against Chinese in the state of California is peppered with taxes and other devices (all of which have been repealed or held unconstitutional) used to impede or completely obstruct the right of Chinese immigrants to complete either in jobs or business. *Yick Wo v. Hopkins*, 118 U. S. 356, is but the most famous of the cases relating to one of the statutes dealing with this question. See *Tin Sing v. Washburn*, 20 Cal. 534; *Chy Tung v. Freeman*, 92 U. S. 275; *People v. Downer*, 7 Cal. 170; Calif. Statutes 1860, p. 307; *Ibid.* 1863-1864, p. 492, Ibid. 1875-1876, p. 744; *Ibid.* 1877-1878, p. 529. (For a full discussion of this subject see Cross, "History of the Labor Movement in California", Berkeley, 1935, pp. 73-87.) The Courts enforcing the Constitution and the people deciding for liberty against hysteria brought an end to this episode.

are not shown to be those of the state or of its agents" was overruled by the court. It was held that the fact that the officers acted under color of law and that they "requested and directed" the wrongful acts was sufficient to render it governmental action; that the law applied regardless of the "instrument" or the "mode" utilized in achieving the result and regardless of whether it was done "by legislative, executive or judicial authority." *United States v. Trierweiler*, 52 Fed. Supp. 4; see also *United States v. Classic*, 313 U. S. 299; *Catlette v. United States*, 132 F. 2d 902; *Culp v. United States*, 131 F. 2d 93; *Picking v. Pennsylvania Ry. Co.*, 151 F. 2d 240; *Screws v. United States*, 325 U. S. 91.

The character of the assault involved here is different from that in the cited case; the principle of law is not. Here in many respects the wrong perpetrated is more serious. It is not a single assault against one individual; it is a continuing attack upon the status of a whole group of persons. Its consequences are felt not only by the entire industry and everyone it employs but the radiations extend far beyond. Lurking in the shadows is "the more subtle and immeasureable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time." *Watkins v. United States, supra,* 354 U. S. 197-198; *Cf.* Mr. Justice Frankfurter dissenting in *Garner v. Board of Public Works*, 341 U. S. 716, 726.[22]

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[22]In a Note on "Legislative Inquiry into Political Activity: First Amendment Immunity from Committee Interrogation", 65 Yale Law Journal 1159, 1179-80, the author deals with a situation in which a witness is compelled to disclose that he has voted for the Communist Party. "His name is placed on the committee's blacklist and on the lists of other similar groups. His friends, business associates and employer learn of his political preferences,

The procedures and methods followed by all respondents merge into an integrated pattern with these substantive objectives. A lack of due process infects the entire product. The California courts have incorporated this product into the law of the state.

E. When the 14th Amendment was incorporated into the fundamental law of the land, its sponsors knew that a new and mighty guardian for liberty, essential to the emancipation of mankind, had been brought into being. They did not know, nor could they, the multitudinous uses to which it would be put. The complex society of today has brought with it new and complex problems, sometimes as different from those of yesterday as the atom bomb is from the weapons that were the means of destruction used in the Civil War. They could see that men had been

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and the committee suggests that they take appropriate action." The author then goes on to discuss the forces thus set into motion.

". . . People who never voted in ways that would embarrass them realize now that they must vote with an eye to the possibility of public examination by an investigating committee.

"The result of the committee's action is to deter many of these people from lawful political activity in which they would otherwise have engaged. They know that they will run much less risk of exposure and embarrassment if they confine their political activity to those orthodox means and goals which are least likely to attract committee attention and, which, if revealed, would cause the minimum public hostility. By compelling Witness A to answer questions about his past voting, the committee has deterred other people from casting their ballots freely in the future, and has thus abridged the political process."

Cf. Note: "The Power of Congress to Investigate and to Compel Testimony", 70 Harv. L. R. 671, 675; Wilcox "Invasions of the First Amendment Through Conditioned Public Spending", 41 Cornell L. Q. 12, 45-6; Dembitz, "Congressional Investigations of Newspapermen, Authors and Others in the Field of Legality Under the First Amendment", 40 Minn. L. R. 517.

enslaved by being forced to work against their will; they did not foresee that men might be enslaved by being deprived of the opportunity to work.

But no more than any other section of the Constitution, was the 14th Amendment intended to apply only to the conditions and problems apparent at the time of its adoption. It announced the basic policy of the nation, not the police *regulation of the moment.* Just as a broad and general statute aimed at liberty offers the most pervasive threats to the people's rights, so the universal language of the 14th Amendment was calculated to assure its effectiveness wherever basic rights were imperiled. This command to the states is directed at substance, not form. Whenever and wherever the state declares and applies a rule of law which runs counter to the mandates which the long history of mankind's striving for liberty has integrated into the concept of due process, the 14th Amendment comes into play.

Man's genius for inventions to dominate natural processes does not exceed the genius of some men for the invention of devices for the domination, not by reason but by coercion, of men's minds. Thus the fight for man's freedom is never concluded. This case is one aspect of this fight directed at a modern device which must be rooted out of our land if liberty is to be preserved.

III.

The State Court Arbitrarily Denied Petitioners Any Protection for Their Federally Secured Right as Witnesses in a Federal Tribunal in Violation of the Supremacy Clause of the Constitution and the Due Process Provisions of the Fourteenth Amendment.

A. Another right which this monopolistic combination deliberately invaded and threatens continually to invade is the free and unfettered right of a citizen to appear as a witness before a Congressional legislative committee, when duly summoned, and claim the privileges granted to him by the Constitution of the United States. If not summoned as a witness by the Congressional Committee, although named therein, the right of the citizen to enjoy the protection of his privacy granted by the laws of the United States and the Bill of Rights and to refrain from voluntarily appearing before said Committee has been and is thus imperiled.

The Constitution, and the laws of the United States made in pursuance thereof, are the supreme law of the land, and the "judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Const. Art VI, Cl. 2. The Constitution places upon Congress the duty to legislate (Art. I). In the performance of that duty, Congress has provided for committee investigations of diverse nature, has made appropriations to cover the expenses and costs of such inquiries, has enacted laws for the compulsory testimony of witnesses, provided fees and compensation for their attendance, and punishment for their failure

to appear when duly summoned, or for refusal to give testimony pertinent to an inquiry. 2 U. S. C. 191-195. [See Appendix A.]

The powers of Congress in the conduct of legislative inquiries and the rights of citizens with respect to such legislative inquiries, under the Constitution, have been definitely interpreted by this Court. *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 231. See also *Kilbourn v. Thompson*, 103 U. S. 168, 195; *McGrain v. Daugherty*, 273 U. S. 135, 176; *Quinn v. United States*, 349 U. S. 155, 161. "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." *Watkins v. United States*, 354 U. S. 178, 188.

It is this delineation of the powers and limitations of Congressional legislative investigations which at the same time fixed the duties and rights of witnesses in such federal forums. Specifically, none of these petitioners were required to appear before the House Committee on Un-American Activities unless duly "summoned" to appear. There are many reasons best known to the Committee why the Committee would not wish to summon the witness. *Cf., Mesarosh v. United States*, 352 U. S. 1; 2 U. S. C. 192. Those petitioners who were summoned before the House Committee could properly decline to answer any question not "pertinent" to the question under inquiry. 2 U. S. C. 192; *Watkins v. United States*, 354 U. S. 178. They were also entitled to decline to answer questions the answers to which might tend to incriminate

them or to reveal their political beliefs, opinions and associations., *Blau v. United States,* 340 U. S. 159; *Quinn v. United States,* 349 U. S. 155; *Emspak v. United States,* 349 U. S. 190; *Watkins v. United States, supra.* The petitioners also had the right to claim the great privileges afforded them by the First and Fifth Amendments without any arbitrary or insidious inferences drawn therefrom that petitioners were criminals or lacking in moral character, truth or candor. *Slochower v. Board of Higher Education,* 350 U. S. 551; *Konigsberg v. State Bar of California,* 353 U. S. 252.

If a monopoly, controlling all employment opportunities in an entire industry, can take it upon itself by concert of agreement and overt conduct to deprive citizens entirely of their right to work in their chosen calling solely because of the exercise of their undoubted rights as witnesses in a Congressional legislative inquiry, it would appear clear that such monopolistic combination is assuming powers that belong peculiarly to the Government of the United States in whose tribunals the proceedings are had. It is certainly essential to the impartial and efficient administration of lawmaking in the Congress of the United States, that witnesses should be able to testify, if summoned by the federal body, unrestrained by fear of governmental or private action which effectively punishes or disables the witnesses from enjoying the fundamental right to earn the means whereby to live. The power of inquiry by Congressional committees and the opportunity to obtain constitutionally permissible information would be greatly embarrassed and impeded if witnesses were liable to lose their right to pursue their chosen professions at the hands of a monopolistic combination, requiring the surrender of all statutory and constitutional privileges in such federal tribunal as a condition of the exer-

cise of the right. The witness who has testified, or who refrains from testifying, before a Congressional committee is accountable for the truth of his testimony and the claim of his privileges only to the United States. Under the supremacy clause of the Constitution, it is therefore unlawful for private individuals as well as State officials to interfere with the exercise of this federal right by depriving, or threatening to deprive, persons who exercise such right of all opportunity to follow their chosen calling.

The importance of the right of witnesses to testify in federal forums free from interference, punishment and disabilities, and threats thereof, has been emphasized in the decided cases. See *In re Quarles*, 158 U. S. 532, *supra*, at p. 537; *Motes v. United States*, 178 U. S. 458. In *Foss v. United States*, 266 Fed. 881 (C. A. 9, 1920), it was held that a witness had a right to be protected in giving testimony before the land office in a contest which involved the right of entrymen under the land laws of the United States. "The power which is delegated to the federal government to dispose of the public lands includes the power to hear and determine contests in the land office, and the power to compel witnesses to testify in such contests, and the power to protect them while so doing, and in all such contests the United States is a party." *Supra*, at p. 883. See also, *Hawkins v. United States*, 293 Fed. 586 (C. A. 5, 1923); *Hoffman v. United States*, 68 F. 2d 101 (C. A. 10, 1933); *Nicholson v. United States*, 79 F. 2d 387 (C. A. 8, 1935).

Moreover, the burden placed by these respondents upon petitioners' exercise of their rights as witnesses before the Congressional legislative Committee was not slight. It involved the surrender of exemptions from testifying which the Constitution affords for the benefit of all per

sons in the United States. As this Court stated in *United States v. Bryan*, 330 U. S. 323, "every such exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth." *Supra*, at p. 331. Thus, what the Constitution of the United States permits as a matter of social and historical national policy, this monopoly forbids and punishes, immunized in its conduct by the judicial arm of the State. Yet, the exercise of the privilege of the First Amendment has been recognized as one of the indispensable freedoms necessary in a government of laws, one of the surest guarantees against official arbitrary conduct in our constitutional system. See the discussion in Point II, above p. 51. See also, *Watkins v. United States*, 354 U. S. 178; *Sweezey v. New Hampshire*, 354 U. S. 234. And with respect to the privilege granted by the Fifth Amendment, this Court has recognized the exercise of the Privilege as "one of the most valuable prerogatives of the citizens." *Slochower v. Board of Higher Education*, 350 U. S. 551, 557.[23]

Thus, it appears plain that the right of witnesses freely to claim their constitutional privileges in a Congressional

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[23] It "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized'." *Ullman v. United States*, 350 U. S. 422, 426. "The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history." *Quinn v. United States*, 349 U. S. 155, 161. "The great right" must be fully recognized by legislative committees or otherwise the right "might be effectively frustrated by private pressures". *Emspak v. United States*, 349 U. S. 190, 195. "Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men." *Grunewald v. United States*, 353 U. S. 391, 421. See also, Griswold, *The Fifth Amendment Today* (1955), Wigmore, *Evidence* (3rd ed.), Section 2250; Cooley, *Constitutional Limitations* (8th ed., 1927), Vol. 1, p. 647.

legislative inquiry is a right secured by the Constitution and the laws of the United States. Yet, the court below denied any legal or equitable relief from a conceded highly injurious invasion of this federal right. It did so despite the plain provisions of the Constitution and the manifest intent of Congress that judicial protection shall be afforded for the enjoyment of any right or privilege secured by the Constitution or laws of the United States. 18 U. S. C. 241-242; 42 U. S. C. 1985. (See Appendix A.) A right secured by the Constitution as an attribute solely of national citizenship is peculiarly a right protected from individual invasion, for here it is unnecessary to point to the Amendments of the Constitution as the source of the protected right. It is the supremacy clause which applies, and private individuals as well as officials are bound to refrain from injuries to rights granted by the Constitution or the laws of the United States. Thus, in numerous diverse situations private persons have been restrained or punished for invading federally protected rights. See *Brewer v. Hoxie School District No. 46*, 238 F. 2d 91 (C. A. 8, 1956), and the cases cited therein at pp. 98-105.

Clearly it was the duty of the state court to protect the exercise of this federal right when its ordinary jurisdiction was invoked as in the case herein.

> "Upon the State Courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made

> in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.' If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination." *Robb v. Connolly,* 111 U. S. 624, 637.

See also, to the same effect, *United States v. Bank of New York & Trust Co.,* 296 U. S. 463, 479; *Mooney v. Holohan,* 294 U. S. 103, 113; *Second Employers' Liability Cases,* 223 U. S. 1, 56-57; *Cloflin v. Houseman,* 93 U. S. 130, 137-143; *Testa v. Katt,* 330 U. S. 386, 389-394. And see, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673, 680-682; *Angel v. Bullington,* 330 U. S. 183, 188; *Ward v. Love County,* 253 U. S. 17, 21; *Laurence v. State Tax Commission,* 286 U. S. 276, 282; *Davis v. Wechsler,* 263 U. S. 22, 24.

B. The court below effectively denied the claim of federal right herein, along with the other fundamental rights set forth in the complaint, by its holding that petitioners had no standing to sue because of failure to allege the existence of a specific contract or the reasonable prospect of one. However, in rejecting the claims of petitioners, the court below attempted to attenuate the claims by reading some of the allegations quite differently than they were stated. Since this tangential ruling actually emphasizes the arbitrary deprivation of petitioners' liberty and property without due process of law, we treat the matter here.

The court below held that certain allegations were "misleading and evasive" [R. 69]. The court reached this conclusion by the following process: It took "judicial notice" of the reports and proceedings of the House Committee [R. 67]. It then observed that 18 of the petitioners had been asked by the Committee "whether he or she was then or ever had been a member of the Communist Party" [R. 67], and that refusal to answer had been based on the privilege against self-incrimination. It noted that each of the 5 other petitioners "was stated to be a Communist by a witness before the Committee and on the same grounds refused to appear and state whether he was then or ever had been a member of the Communist Party" [R. 66]. It will be observed that the court below failed to "notice" the full scope and nature of the inquiries put to petitioners, or the full extent of their claims of constitutional privileges. See Statement of the Case, p. 7, and appendix, pp. 77-78.

From its reading of the proceedings as aforesaid, the court below concluded that the questions which petitioners refused to answer, or the information which they refused to voluntarily appear and furnish "had nothing whatever to do with their political affiliations, associations, or beliefs, but concerned their membership in a conspiratorial and revolutionary junta, one of whose objections is the overthrow of our government by force and violence, a malignant force which menaces the very existence of the government" [R. 68]. The court also held that it necessarily followed that the object of the agreement was not to limit political activities or beliefs, as alleged in the complaint, for "political" implies "orderly conduct of government, not revolution" [R. 69].

It is, of course, plain that this Court must read and interpret the allegations of a complaint for itself when-

ever there is a claim of denial of right under the federal Constitution. *Boyd v. Thayer,* 143 U. S. 135, 181. It is also clear that the aforesaid holdings were not the grounds of the ruling of the court below [R. 75]. Nevertheless, the opinion in these respects is so palpably erroneous, it is respectfully submitted, and appears to have motivated to some degree the final decision denying all relief to these petitioners, that some comment would appear necessary.

From the standpoint of due process—the protection of the individual against arbitrary action—it would appear that the court below pressed the concept of notoriety beyond all reasonable, rational and legal limits. *Cf., Ohio Bell Telephone Co. v. Pub. Utilities Comm'n of Ohio,* 301 U. S. 292, 300-302.

The court below takes judicial notice of the fact that petitioners refused or failed to answer questions concerning Communist Party membership. This, according to the Court, "had nothing whatever to do with their political affiliations, associations, or beliefs." Relying on the concurring opinion of Mr. Justice Jackson in *American Communications Assoc. v. Douds,* 339 U. S. 382, the Court held, that these questions concerned "membership in a 'conspiratorial and revolutionary junta'" dedicated to the violent overthrow of the government. It followed according to the Court that "contrary to allegations of the complaint" the conspiracy charged therein was not designed to limit or control political activities [R. 68].

The Court below, relying on the opinion of a single Justice, ignored the views of the majority of this Court in that same case. There it was recognized that the requirement of the non-Communist oath for officers of unions desiring the services of the National Labor Re-

lations Board will give men who hold union offices "little choice but to renounce communism or give up their offices." And that by this statute "Congress has undeniably discouraged the lawful exercise of political freedoms * * *" In *Schware v. Board of Bar Examiners*, 353 U. S. 232, 244, 246, this Court was confronted with a finding of another state court comparable to that of the California Court. Mr. Justice Black, speaking for the court, disposed of this finding in the following manner. "The court assumed that in the 1930's when petitioner was a member of the Communist Party, it was dominated by a foreign power and was dedicated to the violent overthrow of the Government and that every member was aware of this. It based this assumption primarily on a view of the nature and purposes of the Communist Party as of 1950 expressed in a concurring opinion in *American Communications Assoc. C. I. O. v. Douds*, 339 U. S. 382, 422. However that view did not purport to be a factual finding in that case and obviously it cannot be used as a substitute for evidence in this case to show that petitioner participated in any illegal activity or did anything morally reprehensible as a member of that party. . . ."

This Court has never held that the entire Communist Party is a conspiracy to forcibly overthrow the Government. It did not so hold in *Schneiderman v. United States*, 320 U. S. 118, nor in *Dennis v. United States*, 341 U. S. 494. The Congress of the United States has stated: "Neither the holding of office nor membership in any Communist organization shall constitute per se a violation . . . of any . . . criminal statute." 50 U. S. C. 783(f). (See Appendix A.) Mr. Justice Reed stated in *Bridges v. United States*, 346 U. S. 209, 234, that "there is no necessary identity in law between Communist Party members" and persons who advocate the forcible over-

throw of the Government. See also *Wieman v. Updegraff*, 344 U. S. 183, 190, 191; *Schware v. Board of Bar Examiners*, 353 U. S. 232, 246; *Konigsberg v. State Bar of California*, 353 U. S. 252, 267; *Yates v. United States*, 354 U. S. 298, 336.

It was, therefore, wholly arbitrary for the court below to conclude that a question concerning membership, past and present, in the Communist Party has "nothing whatever to do" with political associations or beliefs, and to conclude that the question really was whether the witness was a member in a "conspiratorial and revolutionary junta," a question, it should be observed, which was never asked. To construe a pleading in this way so as to deny all access to the courts for relief from a wrongful invasion of fundamental rights would, it is submitted, be a sheer denial of due process of law under the Fourteenth Amendment.

Nor, it is submitted, would the court below be justified in inferring that petitioners were members of such "conspiratorial and revolutionary junta" solely because they declined to answer the inquiries upon First Amendment and Fifth Amendment grounds. That no such inference could be drawn from a claim of the First Amendment is plain from such decisions as *Konigsberg v. State Bar of California*, 353 U. S. 252, and *Watkins v. United States*, 354 U. S. 178, if citation were needed. As to claim of the Fifth Amendment, this Court has held again and again that the claim is for the innocent and no inference of wrongdoing can be drawn from an exercise of the privilege. See, *Slochower v. Board of Higher Education*, 350 U. S. 551, 557; *Ullman v. United States*, 350 U. S. 422, 426; *Quinn v. United States*, 349 U. S. 155, 164; *Noto v. United States*, memo. op. of Harlan, Circuit Justice, 76 S. Ct. 255, 257, 100 L. Ed. 1518.

The complaint herein alleged facts which showed a plain invasion of petitioners' fundamental rights. These facts were not denied by respondents, and it was arbitrary to interpret the facts otherwise than they were stated. In denying petitioners any relief for the wrongful invasion of their basic rights, the state court acted contrary to the constitutional command. The "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 1 Cranch. (U. S.) 49, 58.

IV.

The Ruling of the Court Below Denying Petitioners All Remedies for an Admittedly Wrongful Invasion of Their Constitutional, Economic and Civil Liberties Solely Because of the Failure to Plead the Existence of a Specific Contract or the Reasonable Prospect of One Arbitrarily Denied Petitioners the Equal Protection of the Laws in Violation of the Applicable Provisions of the Fourteenth Amendment.

A. In its opinion the California District Court of Appeal outlines its reasoning: The injury claimed according to the court, is "loss or prevention of future or prospective employment in the motion picture industry"; the pleadings allege neither a "certain" nor a "definite prospect" that plaintiffs would obtain employment at the time "of the alleged tort"; therefore no injury is averred and no cause of action is stated. "The most that is alleged is a hope or expectation of employment" [R. 76]. As applied to the facts of this case, this syllogism has the following import: The right to obtain and retain em-

ployment is protected under certain circumstances; under others it is not. Persons who assert that they have been deprived of this right are divided into two classifications. Those who at the time that the wrong is inflicted have contracts of employment or definite prospects thereof are entitled to and will receive protection from the judiciary. Others who have no such contract or immediate prospect are without any remedy; this is so even though they do have existing professions or occupations in a particular industry in which they have had many years experience and acquired high standing, from which they are totally excluded by a monopolistic conspiracy. Petitioners assert that this categorization is arbitrary and denies them the equal protection of the laws guaranteed by the Fourteenth Amendment.

The thesis of the State Court appears to be that the loss of a contract of employment or of a definite prospect of obtaining one produces injury, but the mere total exclusion from any possibility of ever obtaining a contract causes none. An individual who is fortunate enough to have a contract or a definite prospect of one receives protection for the period of the actual or prospective contract. Thereafter if a combination such as that of respondents here permanently closes all avenues to any actual or prospective contract of employment for any individual, he can get no relief. Thus the lesser aspect of the right to work is protected while the same right in its greatest and most significant aspect is reduced to a cipher. Such a classification is capricious.

The right to engage in a profession or occupation is not dependent upon the existence of a contract or reasonable prospect of obtaining one. The state may condition that right upon the obtaining of a license, requiring, the

applicant to measure up to reasonable standards. Such a license clothes its holder with the right to pursue contracts—to compete for work with others in the same sphere of economic activity. Petitioners possess that legal right without a license; they hold the same legally protected right to pursue their professions and occupations in their fields as licensees possess in licensed areas. It will scarcely be disputed that the refusal to grant or the revocation of a license to engage in a profession or occupation causes injury even though the only loss which is suffered is the foreclosure of the opportunity to seek and contract for work. Denial of the right to obtain a license for the purpose of entering upon a professional career causes injury and accordingly such a license may not be denied arbitrarily. *Cf. Konigsberg v. State Bar of California*, 353 U. S. 252. The injury is certainly no less for individuals banished from a profession or occupation (requiring no license) to which they have devoted long years and in which they have achieved considerable success.

Refusal to issue a fishing license to a Japanese alien has been held to be a denial of equal protection. *Takahashi v. Fish & Game Comm.* 334 U. S. 410. Without the license it was illegal for the applicant to fish either as an employee or as an independent business man. There was no allegation that the applicant had a job or a reasonable prospect of obtaining one or that he was in business for himself. This, of course, was immaterial because the wrong lay "in excluding any or all aliens who are lawful residents of the state from making a living by fishing in the ocean off its shores while permitting all others to do so." 334 U. S. at 421. More recently this Court has said: "A state cannot exclude a person from the

practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection clauses of the Fourteenth Amendment." *Schware v. Board of Bar Examiners*, 353 U. S. 232, 238. If exclusion from an occupation were not injurious the State's proscription would contravene no constitutional principle.

One who loses a contract or a prospect of one may live to contract another day. He has lost a job, not all opportunity for a livelihood in his chosen work. Under California law as declared by the Court below, the loss of one job is remediable; the loss of all future employment is not. Were the California courts to afford a remedy for a *broken* limb, but none for *loss* of one, their position would be neither more nor less reasonable than it is in this case. For the right to work and pursue one's chosen calling is a fundamental liberty far surpassing in constitutional significance the maintenance of individual contracts. Its destruction results in injury far more reaching than does interference with a single contract or a prospect of one. *Truax v. Raich*, 239 U. S. 33; *Allgeyer v. Louisiana*, 165 U. S. 578; *Meyer v. Nebraska*, 262 U. S. 390; *Yick Wo v. Hopkins*, 118 U. S. 356, 370.

The equal protection clause of the Fourteenth Amendment guarantees all persons the equal enjoyment of "personal and civil rights" including the right "to pursue their happiness and enjoy property." The redemption of this pledge lies in "like access to the court for the protection of their persons and property, the prevention and redress of wrongs. . . ." *Barbier v. Connolly*, 113 U. S. 27, 31, cited in *Abe v. Fish & Game Comm.*, 9 Cal. 2d 300, 303-4.

That equal protection does not forbid reasonable classification has been established by a long series of cases. However, only where there are "genuinely different characteristics of the business involved" is classification without discrimination possible. *Morey v. Doud*, 354 U. S. 457, 466. The State may not exclude an individual from a profession "merely because he was a Republican or a Negro or a member of a particular church" or political party. *Schware v. Board of Bar Examiners*, 353 U. S. 232, 239. The opportunity of earning a livelihood in a particular occupation or profession may be refused to those who cannot meet standards which are necessary to protect the public against injury. It may not constitutionally be denied to members of minority groups because of their unpopularity. Protection against economic competition or the desire to insure private gain cannot justify foreclosing anyone's opportunity to work for a living. Otherwise statutes designed to eliminate the competition of aliens or of cheap labor would have withstood the test of constitutionality. *Cf., Yick Wo v. Hopkins, supra; Truax v. Raich, supra.*

Among the difficulties encountered in any attempt to sustain respondents' position that there is no denial of equal protection of the laws here is the limitless extent of the doctrine urged and its ultimate consequences. What was said in *Truax v. Raich, supra*, has equal force here. "The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded." 239 U. S. at 43. If an individual without a contract of employment or a prospect of one suffers no legally cognizable injury by being precluded from the opportunity of securing work,

then all of the employers in the State of California may legally agree not to employ any of these petitioners or any other persons whose political or religious views are deemed distasteful. Without inflicting injury on anyone, the extension of the conspiracy charged here could limit the opportunity to compete for jobs in the motion picture industry and in every other major industry in the state to "Anglo-Saxons" who had never taken a stand more controversial than the pledging of allegiance to the Constitution of the United States and who had never participated in associations more suspect than the Sons and Daughters of the American Revolution.

An "attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date" has been declared by this court to violate the equal protection clause. *Mayflower Farms, Inc. v. Ten Eyck*, 297 U. S. 266, 274; *Morey v. Doud*, 354 U. S. 457. Here the economic discrimination is not between those who are about to enter and those who are already established in an industry; it is between individuals in an industry who at a given time have contracts or prospects of contracts and those who at that moment have none. The ones with the direct prospects or contracts receive some protection against a conspiracy designed to drive them out of the industry. Those not so lucky as of the time the conspiracy becomes effective against them and who can therefore never anticipate even a prospect of a contract, have no remedy. The economic disadvantage to the latter as compared with the former when the right of both to a livelihood is the object of a conspiracy cannot be justified.

Viewed from another perspective, the differentiation in treatment grants immunity to some wrong-doers while subjecting others to legal sanctions without any reasonable basis for such discrimination. Indeed, the greater wrong is exempted for liability while the lesser confers a basis for the recovery of all damages suffered. A single individual interfering with the realization of the prospects for a single contract must face the consequences of his wrongful act. A monopolistic combine which excludes a whole class of persons from all opportunity of ever obtaining any employment in an entire industry may not be held responsible at all. This combination may continue with impunity and expand its proscription to embrace all who fail to conform to the standards of belief and association which the combination imposes upon the industry. The immunizing of such wrong-doers is part of a classification process which the Fourteenth Amendment does not tolerate.

B. This arbitrary result is achieved through the process of riding roughshod over the established law of the state—both statutory and judicial. This is not a case in which a court has changed its construction of the law. This is not one in which an established legal principle has been abandoned and another substituted.[24] Starting with the proposition that these petitioners had engaged in conduct which entitled them to no protection, the Court, by treating rules of law as non-existent, refused to give petitioners the benefit of the established state law which

[24] This was no mere over-sight or judicial error. The principles and authorities which the court totally disregarded were cited in Petitioners' briefs.

would have required a ruling favorable to them. *Cf., McFarland v. American Sugar Ref. Co.*, 241 U. S. 79, 86.

(1) By reason of the conspiracy which prevented petitioners from effectively seeking employment in the motion picture industry, they have been barred from the prospect of securing any contract of employment providing for a specified rate of compensation; therefore they cannot with specificity allege the amount of damages suffered. All of the other elements essential to a cause of action are set forth in the complaint with unchallenged certainty. The wrong in its various aspects is spelled out. The injury —the total deprivation of the right to pursue an occupation plus impingements upon First Amendment rights— is equally definite. The only uncertainty arises out of the fact that the wrongdoers have by their wrongful action made the determination of the exact amount of damages suffered difficult. The rule applicable to such a situation has been stated by the California Supreme Court in *Speigle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 40: "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created. . . . That principle is an ancient one . . . and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application."

Under California law recovery of damages is allowed for a wrong resulting in inability to follow an occupation, without regard to the existence of a contract or a prospect of one. *Dotson v. International Alliance etc. Employees*, 34 Cal. 2d 362, 374. This is the rule where disability results from personal injuries. *Osterude v.*

Almquist, 89 Cal. App. 2d 15, 20; *Tornell v. Munson*, 80 Cal. App. 2d 123, 125; *Shaw v. Southern Pacific R.R. Co.*, 157 Cal. 240. A similar rule has been applied in libel cases where the words tend to injure an individual in his occupation. *Washer v. Bank of America*, 21 Cal. 2d 822, 829. The uncertainty of damages for loss of work is no greater in the cited instances than the present one.

Damages are allowed for loss of good will in a business even though there has been no interference with existing or prospective contracts and damages are not capable of ascertainment in any precise manner. *Ross v. Frank W. Dunn Co.*, 119 Cal. App. 2d 690, 702; *Beckett v. City of Paris Dry Goods Co.*, 14 Cal. 2d 633; *Phalanx Air Freight v. Nat. etc. Freight*, 104 Cal. App. 2d 771, 776. Here the petitioners over a period of many years have established a reputation for the excellence of their work and have achieved a high standing in their professions and occupations in the motion picture industry. The value of these assets to an employee cannot be distinguished from the value of good will to a going business. To permit the recovery of damages for one and to deny them for the other is a policy which can find no support in reason and which discriminates against these petitioners.

The same three judges who decided the case below had held that an agreement not to compete (one falling within the specified exception to illegal restraints on trade) created a basis for a money judgment even though damages could not be measured with exactness. *Laird v. Steinman*, 97 Cal. App. 2d 781, 786. The distinction between wrongful competition and a wrongful refusal to permit competition where specific damages can

not be ascertained in either instance, is so tenuous that an allowance of damages in one instance and the denial in the other is patently unfair.

There is also an established California rule that the success of an enterprise in the past "provides a reasonably certain basis for the ascertainment of the probable loss . . ." *Hoag v. Jenan*, 86 Cal. App. 2d 556, 564; *Stott v. Johnson*, 36 Cal. 2d 864, 876. Thus it has been said that where an individual by reason of another's wrong is rendered "less or wholly incapable" of engaging in a business occupation in which the plaintiff has been previously engaged" he may recover damages therefor predicated upon all relevant data including the nature of the work or business previously engaged in, petitioners' earnings therefrom, what the average earnings in the past were and other relevant circumstances. In such cases, damages flow not from a special loss of contracts or relationships but from the fact that the wrong has diminished petitioner's ability to compete in the marketplace and has deprived him of the opportunity to contract for his services and to obtain earnings therefrom. *Shaw v. Southern Pacific RR. Co.*, 157 Cal. 240, 243-5. Here it is conceded that petitioners have been employed in the motion picture industry and have acquired a valuable status therein. Nevertheless, they were denied the opportunity to prove the damages which they have sustained by the same kinds of evidence admissible in other cases in which the injury suffered is exclusion from an occupation by reason of physical injury or some other wrong. This inequality of treatment has no public interest to support it and must fall before the demands of the Constitution.

Finally, under California law where there is a breach of a legal right, the injured party is entitled at least to nominal damages, even though no actual damages can be proved. *Ross v. Frank W. Dunn Co.*, 119 Cal. App. 2d 690, 700. *Cf., Sterling Drug, Inc. v. Benatar*, 99 Cal. App. 2d 293, 400; *Treadway v. James*, 57 Cal. 137; *Creighton v. Evans*, 15 Cal. 9, 11; *Bromberg v. Signal Gasoline Corp.*, 130 Cal. App. 469, 471. The basis for this rule is that "The law in the absence of proof of actual damage will presume it where the rights of the plaintiff have been violated." *Pleasants v. North Beach and M. R.R. Co.*, 34 Cal. 586. Thus in an action based upon an attempt to destroy plaintiff's business by false statements, a judgment of $100.00 general damages and $2,000.00 exemplary damages was sustained, although there was nothing to indicate that a single customer had been lost as a result of the wrong. *Finney v. Lockhard*, 35 Cal. 2d 161. The complaint here also alleges that petitioners are entitled to exemplary damages. [R. 37.]

No consideration was given by the Court below to this principle which it did not purport to override. The refusal to apply the principle to these petitioners and to allow them to recover at the very least nominal damages (assuming that they could not prove actual damages under the California law) plus such exemplary damages as a judge or jury might deem appropriate discriminatorily placed petitioners in a specially created classification and deprived them of equal protection of the law.

(2) Damages is not the only relief for which petitioners prayed or to which they were entitled. They also asked for an injunction against interference with their right to work. The California law is settled that

when damages are difficult or impossible of measurement, an injunction will issue where a wrong has been inflicted, "that ought not to be submitted to on the one hand or inflicted on the other." *Anderson v. Souza*, 38 Cal. 2d 825, 835; *Thome v. Honcut Dredging Co.*, 43 Cal. App. 2d 737. In this connection it has been held that anything which invades a legal property right causes injury thereby as a matter of law regardless of whether it causes substantial or ascertainable damages and that injunctive relief must be granted in those cases. *Selsenthal v. Warring*, 40 Cal. App. 119, 129; *Pellissier v. Whittier Water Co.*, 59 Cal. App. 1, 6-7. In such a case if the wrongdoer contends that no damage can result from his conduct, he, having created the possibility of damage, bears the burden of proving that no damage will occur if he wishes to avoid an injunction. *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 381; *Smith v. Wheeler*, 107 Cal. App. 2d 451, 455-6. The failure to grant petitioners injunctive protection has not been and cannot be justified while the requirement of equal protection is the law of the land.

(3) Clearly it was not the intent of the Court below to modify all of the well-established principles of law discussed above, nor did it have the right to overrule the decisions of the Supreme Court of the State on this point. *Warner v. Steamship Uncle Sam*, 9 Cal. 697; *People v. McGuire*, 45 Cal. 56; *Janofsky v. Garland*, 42 Cal. App. 2d 655; *Melancon v. Disney*, 127 Cal. App. 2d 213; *Christina v. Roxes*, 100 Cal. App. 2d 46; *Stone v. San Francisco*, 27 Cal. App. 2d 34.

In *Yick Wo v. Hopkins*, 118 U. S. 356, 373-4, the Court said: "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and ad-

ministered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

What the Court below did here on point after point was to refuse to consider or to apply for the benefit of these petitioners the established California law. Only thus was it possible for the Court to reach the incongruous and discriminatory conclusion that interference with the prospect of a single contract causes injury but that total deprivation of all opportunity to follow a profession in which one has earned high repute results in no injury which the law will protect. The withholding from the petitioners of the benefit of settled and deep rooted legal principles paved the way to the arbitrary classification which became the Court's justification for the refusal of all relief thereby denying petitioners the laws equal protection.

C. Section 1101 of the California Labor Code prohibits any employer from "controlling or directing, or tending to control or direct the political activities or affiliations of employees." Section 1102 of the same code provides: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." (See Appendix A.) That the employers in this case did precisely what these provisions of the California law forbid is admitted [Para. VII of the first cause of action of the complaint, R. 37].

In its decision, the District Court of Appeal makes no reference to these statutory provisions except obliquely through the citations of *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 485 for the proposition that "the word 'political' implies 'orderly conduct of government not revolution'." [R. 69.] An examination of the purpose for which this case was cited reveals another aspect of the arbitrary classification of petitioners and of the denial to them of the equal protection of the law. In the cited case, the Supreme Court of the State, for the first time construing Section 1101 of the California Labor Code, held that the political activities protected by the section did not include the advocacy of the overthrow of the government by force or violence, and that the section was concerned with activities "related to or connected with the orderly conduct of government and the peaceful organization, regulation and administration of the government." 28 Cal. 2d at 481. This principle of law, declared by the California Supreme Court, was applied by the Court below to the present case in the following manner. The court took judicial notice of the fact that petitioners had refused to answer questions concerning membership in the Communist Party. These questions, the court said, did not relate to political affiliation but concerned rather participation in a "revolutionary junta" [R. 68].

This classification of plaintiffs' conduct before the committee is arbitrary and denies to the petitioners the equal protection of the laws. See *supra*, p. 81. Also it undoubtedly explains the court's lack of reference to Section 1101 and 1102 of the California Labor Code; for if petitioners were members of a class who were not entitled to the protection of those code sections, refer-

ence to them was unnecessary. By thus classifying petitioners and denying them the protection of these provisions of the law of the State of California, the Court ran counter to the requirements of the Fourteenth Amendment, guaranteeing equality before the law to petitioners.

V.

The Attempt of the Respondents to Justify Their Conduct as a Matter of Law Is Baseless Under the Constitution in the Light of the Posture of the Proceedings and the Constitutional Protection Afforded Petitioners Against Total Denial of Remedies by the State for Admitted Wrongful Interference With the Exercise of Petitioners' Federal Rights.

While the respondents maintained, in opposition to certiorari, that petitioners had not shown any "legally protected interest" which had been invaded, and that the complete denial of any relief from respondent's wrongdoing by the dismissal of the complaint was not "state action", they nevertheless, in addition, asserted below and in their brief in opposition to certiorari that all their admitted conduct as aforesaid was justified *as a matter of law*. Some discussion of respondents' additional attempt to avoid a trial on the merits warrants analysis here.[25]

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[25]Before reaching the substance of respondents' arguments, it should be noted that ordinarily the question as to whether the tortious acts of a party are "justified" is dependent upon the facts of a particular case, facts which must be pleaded and proved. "It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U. S. 194, 204. "As in other instances where justification is required, the burden of proof was upon

The gravest constitutional questions are raised by the attempt of respondents to justify their tortious invasion of petitioners' basic rights. If, as a matter of law, the judicial arm of the State were to hold that respondents were justified in doing all that they admit they did as alleged in the complaint, serious questions of deprivation of liberty and property without due process of law and the denial of equal protection of the laws would be presented. The issue was of course not reached here in view of the ruling of the court below. In fact, however, it will be found that respondents' arguments are unsubstantial and largely directed to the trier of the facts. Respondents have admitted their wrongdoing, but they have not yet pleaded or proved their justification. It is the action of the State which relieved them from that burden.

What the respondents in substance argued below was this: As a matter of law, it can be reasonably inferred that the concerted agreement to exclude persons from employment in an industry because of refusal to answer questions concerning beliefs, political affiliations and associations upon First Amendment and Fifth Amendment grounds was in reality an agreement to exclude persons who are "not only unwilling to disclaim Communist membership but who by that very refusal stamped themselves

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the defendant to establish the existence of such an occasion." *Owen v. Williams*, 322 Mass. 356, 360, 77 N. E. 2d 318, 321. "The courts have not attempted to formulate a rule by which justification or lack of justification may be determined, but have said in general the issue is largely one of fact for the jury; the standard being reasonable conduct under all the circumstances of the case." *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 463, 205 N. W. 630, 632. See also 84 A. L. R. 43, 79; 96 A. L. R. 2d 1227, 1263. This was of course explain why respondents were driven below to urge that their conceded conduct was justifiable as a matter of law.

in the public mind as being Communists in fact" (Resp. Br. p. 55). It should be reasonably inferred therefore, argued respondents, that the inevitable result of such public attitude would be "loss of patronage and business reputations"; that the "industry" was committed to cooperation with the House Committee and that if this agreement were not made, "the cooperative intention of the industry would be made to seem hypocritical cant" (Resp. Br. p. 57); that the agreement, as reasonably inferred, was "further justified as an appropriate means of guarding against the injection of Communist propaganda into motion pictures" (Resp. Br. p. 59).[26] It followed, according to respondents' argument, that this agreement was no more than an agreement among employers to establish "general and non-discriminatory qualifications for employment" (Resp. Br. p. 31); that "an employee's moral character, obedience to law and private conduct are matters of proper concern to his employer" (Resp. Br. p. 38); that respondents were seeking to protect "freedom of enterprise" and "the interest of society generally in a state of law and order" (Resp. Br. p. 40); that the agreement was an appropriate method to "induce obedience to law as against lawlessness" (Resp. Br. p. 40): that petitioners were not seeking by their action to protect their fundamental "right to work", but were seeking "to be free to engage in activity which may lead to criminal prosecution without suffering the social and economic consequences which usually attend that kind of conduct" (Resp. Br. p. 41).

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[26]In this argument, Respondents virtually admit that they have joined with the Committee to blacklist those individuals attacked by the Committee.

It should be observed that these were not arguments made by an individual employer in a lawsuit for breach of an employment contract. These arguments were advanced by an admitted monopolistic combination controlling all employment opportunities in the industry. These are arguments made to justify all the conceded injuries to petitioners committed by respondents' wrongdoing as set forth in the complaint, and these arguments are made, not after pleading and proof at a trial, but upon demurrer to petitioners' claims for legal and equitable relief. Moreover, the claimed justification cannot be reconciled with the rights, privileges and liberties to which the Constitution is committed.

It is not denied that citizens may lawfully claim their constitutional privileges before the Committee or refrain from appearing therein unless duly summoned. What the respondents are asking a court of law to do is to infer that when a person claims his constitutional privileges before the Committee with respect to an inquiry concerning Communist Party membership, then such person is a member of the Communist Party, lacking in good moral character, contemptuous of the law and engaged in criminal activities. That no such inferences can be drawn in a judicial forum with respect to the invocation of the First and Fifth Amendment privileges is firmly established, as previous discussion has indicated (p. 85, *supra.*)

It is urged by respondents, however, that all that the conspiracy did was justified because it can reasonably be inferred that "the public" draws such invidious inferences. But, actually, if a court of law is free to draw such inferences, it is equally free to draw quite contrary inferences. A court of law could properly infer that the

"public" looks upon the privileges granted by the Constitution as inviolable and deplores any invasion or abridgement of those rights. The public might infer that monopolistic combinations which deprive persons of their right to follow their callings because of lawful claims under the Constitution were themselves immoral, lawless and subversive. Whatever inferences might be drawn by the "public" is, therefore, hardly a justification as a matter of law for the admitted conduct of these respondents under this complaint.

Moreover, as respondents recognized, an argument concerning private "inferences" which might be drawn had no relevance to the issues here unless related to respondents' conduct. Therefore, respondents urged that the persons who drew such inferences would inferentially not attend any motion picture in the industry at all, from which it followed that respondents, to protect their common economic interests and avoid threatened injury, were compelled to combine as they did and do what they did. But it is simply requiring the court to engage in the grossest conjecture and surmise to infer that some persons will not attend a single motion picture in which a performer whom they dislike appears, and then to infer therefore that such persons will attend no motion pictures at all. Respondents advanced this argument in order to justify the coercion practiced upon all employers in the industry, but petitioners have constantly stated that they are prepared to prove that the industry suffered no economic injury and was not threatened with such injury; that indeed persons who had invoked their constitutional privileges before the same legislative committee continue to star in theatrical hits on Broadway; that one of the petitioners here, Michael Wilson, received an award from the Motion Picture Academy of Arts and Sciences after

his invocation of his privileges before the committee, that a number of motion pictures written by other petitioners here have been profitably redistributed with the names of petitioners appearing thereon. Moreover, the claim of "common interests" in an "integrated industry" could be refuted by demonstrating that the respondents in fact do have economic interests which conflict, that they carry on publicity campaigns for their own interests and their own productions, and that what is profitable for one may not be profitable for the other. In short, far from inferring that all of the employers in the industry would be commonly injured because some persons would draw in invidious inferences from a claim of constitutional privileges, the proof would show that this concerted agreement was actually conceived as a means of coercing individual employers to refrain from employing petitioners, so that no profitable competitive advantage could be obtained by independent employers over the combine, or among its members. Clearly, this would not justify the concededly tortious invasion of petitioners' rights as a matter of law, and the denial by the State of all relief therefrom.

Moreover, the argument that because some persons may decline to attend motion pictures when constitutional privileges are invoked, this always justifies a monopolistic combination in its invasion of the right to work and other basic freedoms, is fraught with even greater vice. If certain "pressure groups" do not care for performers of the Catholic faith, or the Protestant or Jewish faith; or if some segment of the population does not like Negroes; or Republicans, or Democrats; or "union men" or "non-union men", does it follow that respondents, whatever they may do as individual employers, can combine to exclude such classes of persons from their chosen callings,

coercing all employers in the industry to do the same and circulating blacklists to make their coercion effective? If respondents' argument, that all that they did was justified as a matter of law, be valid, it would follow that conspiracies to commit any or all of the aforesaid invasions of rights would be within the pale of the law. If all access to the courts were denied under such circumstances, without even a trial on the facts, it would be difficult to speak of rule under a "government of laws, not of men". Conduct, admittedly as wrongful as it is here, can not be justified at all, but if justification could be shown, it at least would have to be pleaded and proved if fundamental claims under the Constitution are not to be denied.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnett*, 319 U. S. 624, 638. The right of the individual to assert his political principles at the times of his choice and to maintain them inviolate against governmental interference is one of these. The winning of a popularity contest cannot be the precondition for its exercise. *Cf. Cantwell v. Connecticut*, 310 U. S. 296, 310. If the motion picture industry may banish all individuals not certified by Madison Avenue as beloved by the public, then so may every other industry. If institutional advertising is any test, then every major industry considers public good will essential to its welfare and any industry can justify such a policy on the same grounds advanced by the motion picture respondents. The result would be a land in which everyone would be free to think, speak, write and associate as he pleased provided he were willing to risk his status in his chosen occupa-

tion, the opportunity to work therein and the resultant economic consequences for himself and his family. (See for the ever increasing growth of monopoly concentration, Report Senate Subcommittee on Antitrust and Monopoly, 85th Cong. 1st Sess. (1957)—Concentration of American Industry.) Indeed, competent observers have noted that to a considerable measure this nation already suffers from this genus of "freedom" and that its toll has been heavy. *Cf.* Nanette Dembitz, "Congressional Investigation of Newspapermen, Authors and Others in the Opinion Field—Its Legality and the First Amendment", 40 Minn. L. R. 517, 519-20.[27]

In opposition to the petition for a writ of certiorari, respondents recast their argument and presented their version of "justification as a matter of law" in a new form. It was urged by respondents *arguendo* that at most the State court by its denial of all relief had merely chosen

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[27] In a footnote at page 520, the author illustrates:

"See, for examples of this observation from diverse sources, letter from former United States diplomatic officials, stating 'Fear is playing an important part in American life.' N. Y. Times, Jan. 17, 1954, Section IV, p. 8E, col. 6; Secretary of State Dulles' reference to the authors of the letter as 'a distinguished group of former diplomats whom I highly respect.' N. Y. Times, Jan. 20, 1954, p. 9, col. 2. See also President Eisenhower's speech at Dartmuth College against 'book-burning,' N. Y. Times, June 15, 1953, p. 1, col. 6. See article entitled, *To Insure the End of Our Hysteria*, by Paul G. Hoffman, Chairman of the Board of Studebaker-Packard Corporation, describing 'The complex of fear that has spread over America . . . ' in respect to freedom of thought and expression, N. Y. Times Magazine, Nov. 14, 1954, p. 9. See also Oakes, *This Is the Real, the Lasting Damage*, N. Y. Times Magazine, March 7, 1954, p. 9. For a sidelight on the issue, see letter from 'High School Teacher' in the strongly anti-Communist *New Leader*, April 20, 1953, p. 28, complaining that the fear of political expression instilled in the students by other teachers makes it impossible for her to continue to tell them that talk of repression is only Communist propaganda."

"a policy: which the Constitution does not prohibit." What was this policy? The policy, variously stated, was "that employers are free to agree with each other upon terms and conditions of employment, one of which may be employees' obedience to appropriate inquiries of government investigators" (Resp. Op. Br. p. 14); a policy of "complete freedom of bargaining in respect of employment and employment opportunities" (Resp. Op. Br. p. 14); a policy in short, of "freedom of contract" (Resp. Op. Br. p. 12). It was urged that this Court not return to the "Lochner-Coppage-Adkins philosophy" (Resp. Op. Br. p. 13).

Of course, the State court below announced no such policy, and respondents concede as much. They urge, however, if their jurisdictional arguments be not accepted, that the ultimate effect of the dismissal of the complaint would be no more than the choice of "competing policies" which a State should be free to make. But respondents' statement of the "policy" appears to disregard the facts alleged in the complaint and to confuse legal issues arising therefrom. The complaint herein does not involve an individual employer's freedom of contract, nor problems of labor—management bargaining relations. Nor does it involve "freedom to agree" upon terms and conditions of employment. The so-called "policy" which respondents ascribe to the State, *and the only one alleged in the complaint*, is this: That employers controlling all employment opportunities in the motion picture industry may in concerted agreement coerce every employer in the industry, and themselves, and use blacklists to make that coercion effective, for the purpose and with the intent of depriving persons who are pursuing their callings in the industry from ever working at their chosen professions or exer-

cising their rights of opinion, belief or association unless such persons forego their lawful constitutional privileges before the House Committee on Un-American Activities, all with the ultimate objective of limiting the political beliefs and activities of such persons and the employees in the industry, to the end that the beliefs, opinions and associations of employees in the motion picture industry and the content of motion pictures shall be satisfactory to the House Committee on Un-American Activities.

It is this policy which is involved herein, at this stage of the proceedings, and as we have endeavored to show in this brief such "policy" is forbidden by the Constitution and the laws of the United States and has no reasonable relation to any interest which the State is entitled to protect. *Cf., Wieman v. Updegraff,* 344 U. S. 183; *American Federation of Labor v. Swing,* 312 U. S. 321; *Marsh v. Alabama,* 326 U. S. 501; *West Va. State Bd. of Education v. Burnette,* 319 U. S. 624. A policy of a State, whether established by the judiciary or the legislature which denies the right of citizens to live except at the will of a monopolistic combination because citizens have exercised First Amendment and Fifth Amendment privileges in a federal tribunal is not the expression of a lawful "social or economic experiment"; it is a policy completely at variance with the protective guarantees of the supreme law of the land. *Cf. Am. Fed. of Labor v. Swing,* 312 U. S. 321, 326.

VI.

The Dismissal of the Complaint as to the Members of the House Committee and Its Investigator Was Similarly Contrary to the Supremacy Clause of the Constitution and Deprived Petitioners of Their Liberty and Property Without Due Process of Law and Denied Petitioners the Equal Protection of the Laws in Violation of the Pertinent Provisions of the Fourteenth Amendment.

The complaint was dismissed as to the remaining three respondents upon the same ground as it was dismissed against all the other respondents [R. 61]. All that has been heretofore discussed in this brief on that legal issue will, therefore, be equally applicable here and we do not repeat the discussion.

It should be noted, however, what these three respondents by their demurrer admit. They entered into the concerted agreement with the other respondents as alleged in the complaint [R. 35]. They "undertook to and did induce and persuade other employers in the motion picture industry to desist and refrain from employing and to refuse employment to all such employees and other persons" [R. 36]. They circulated the list of names "with the direction and intent" that the petitioners be not employed [R. 36]. The purpose and intent of their conduct was as alleged in the complaint [R. 37]. At all times mentioned in the complaint these three respondents conspired and furthered the conspiracy both in their official capacity and individually in non-official capacities [R. 35].

While the question of the exemption *vel non* of public officers from liability did not arise in the posture of the proceedings below, and was not the ground of the dismissal of the complaint, it should be noted that the

facts set forth in the complaint showed conduct far removed from official duty. It is certainly not within the scope of the jurisdiction of members of a legislative committee, or employees of such a committee, to conspire with private persons to deprive citizens of their right to work and to further the conspiracy by circulating blacklists and otherwise coercing employers in the industry. The complaint, fairly construed, showed a tortious invasion by these three respondents of petitioners' rights, the respondents committing these wrongs both in their official capacities and as individuals. The following language is applicable here: "It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent." *Ex parte Virginia*, 100 U. S. 339, 348. See also, *United States v. Bramblett*, 348 U. S. 503; *Lewis v. Brantigam*, 227 F. 2d 124, 127-129; *Picking v. Pa. R.R. Co., et al.*, 151 F. 2d 240 (C. A. 3, 1945).

Conclusion.

The judgments of the court below should be reversed.

Respectfully submitted,

ROBERT W. KENNY,
BEN MARGOLIS,
Attorneys for Petitioners.

SAMUEL ROSENWEIN,
Of Counsel.

APPENDIX A.

Consitutional Provisions and Statutes Involved.

The pertinent portions of provisions of the Constitution read as follows:

Amendment XIV, Section 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment I: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

Article VI: ". . . This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

The pertinent portions of provisions of United States Statutes read as follows:

18 U. S. C. 241, June 25, 1948, c. 645, 62 Stat. 696.

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by

the Constitution or laws of the United States, or because of his having so exercised the same; . . . .

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

18 U. S. C. 242, June 25, 1948, c. 645, 62 Stat. 696.

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

50 U. S. C. 783(f), Sept. 23, 1950, c. 1024, Title I, Section 4(f), 64 Stat. 991.

"Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. . . ."

2 U. S. C. 192, as amended June 22, 1938, c. 594, 52 Stat. 942, reads:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any Committee of either House of Congress, willfully makes default or who, having appeared, refuses to answer any question pertinent to the

question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

The pertinent provisions of California Statutes read as follows:

California Labor Code, Section 1101.

"No employer shall make, adopt, or enforce any rule, regulation, or policy:

"(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

"(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

California Labor Code, Section 1102.

"No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

APPENDIX B.

1. The Committee's Hollywood Hearings—Its First Investigation of the Motion Picture Industry October 20-30, 1947.

A. The Committee's Statement of Purpose.

Chairman Thomas. This Committee, under its mandate from the House of Representatives, has the responsibility of exposing and spot-lighting subversive elements wherever they may exist. [P. 2, Oct. 20, 1947.]*

* * *

The Chairman. These 79 persons that I named before are not just the run-of-the-mill; they are very prominent persons, prominent in the industry, and those are the people that we have the records on; those are the people whose records are going to be brought out before this hearing is over. Do you not think they should be?

Mr. (James Kevin) McGuinness. I think that the greatest fight that can be made against communism is to identify the Communists and to force them to take the responsibility that every other American takes, to appear publicly, state, advocate, and support his own beliefs, and be judged by the American people as to whether those beliefs are worth while, or not. [P. 140, Oct. 22, 1947.]

* * *

Mr. Stripling (Committee Investigator). Don't you think this committee has an obligation to expose them if they are there?

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*All references in Appendix B1 are to the Hearings of the House Committee on Un-American Activities (80th Cong.) into Communist infiltration in the motion picture industry—October 20 to October 30, 1947.

Mr. (Eric) Johnston. I have always said that you did, but I have always thought you should do it under the American program of a free and fair trial. I have never objected to your investigating Hollywood. I told you we welcomed it, and we sincerely do. We haven't always welcomed some of the methods you have adopted. [P. 323, Oct. 27, 1947.]

* * *

The Chairman. Mr. Johnston, you have by inference been very critical of the methods of this committee. That is your prerogative. Many other persons have been very critical of our methods. Many have approved them. But this committee is created by law, Public Law No. 601. One of the duties of the committee is to expose. I am going back over the years but this year we have exposed communism in the labor field, communism in the Government. We have spot-lighted persons like Gerhart Eisler, Hanns Eisler—who, incidentally, was employed in the moving-picture industry, and employed at a very large salary—Eugene Dennis, many others over the period of years is the result of exposures in the spotlighting. We have been instrumental in aiding persons like Earl Browder to go to jail, Fritz Kuhn to go to jail, Pelley to go to jail, doing away with the German-American Bund. So I don't see that the moving-picture industry, any more than we will say some other field, has any sanctum sanctorium before it. We are going to continue to expose and if you will just sit around here every day this week, you will see more expose and more spotlighting of Communists than you have ever seen before. What you heard this morning, what you saw this morning, was just typical of what you are going to hear and see all the rest of the week and maybe some of next week—and it makes no difference whether you have got glamour

girls out there or whether you have got a lot of funds behind you or not, if there are Communists in that industry we are going to expose them. [P. 328, Oct. 27, 1947.]

* * *

The Chairman. The Chair would like to make this statement.

The hearings today conclude the first phase of the committee's investigation of communism in the motion-picture industry. While we have heard 39 witnesses, there are many more to be heard. The Chair stated earlier in the hearing he would present the records of 79 prominent people associated with the motion-picture industry who were members of the Communist Party or who had records of Communist affiliations. We have had before us 11 of these individuals. There are 68 to go. This hearing has concerned itself principally with spotlighting Communist personnel in the industry. [P. 522, Oct. 30, 1947.]

* * *

B. Blacklisting as the Objective of the Committee.

Rep. Thomas. We can't understand if you have talked to the other producers why they don't do something.

Mr. (Jack) Warner. I talked to them individually.

Rep. Thomas. All right, individually. They probably consciously or unconsciously agree with you, but just give you a blank stare, as you say. But we want to know what you can do about it. How will you correct the situation.

Mr. Warner. As I said, I have gone out whole hog to try to get these people to do something about it. I can't understand why people engage them.

Rep. Thomas. That is what we would like to know.

Mr. Warner. I can't fathom it, to save my life.

Mr. Thomas. But we want to know how you are going to correct the situation. Do you think they will keep on engaging them and keep on doing this until the first thing you know the industry gets a black eye, or will they ultimately get religion as you have got religion?" [P. 49, Oct. 20, 1947.]

* * *

Mr. Stripling. Don't you think the most effective way of removing these Communist influences—and I say Communist influences: I am not saying Communists—I am not accusing them all of being Communists—but don't you think the most effective way is the pay-roll route? In other words, if the owners and producers cut these people off the pay roll it would eliminate it much quicker than a congressional committee or crusades and so forth. [Pp. 49, 50, Oct. 20, 1947.]

* * *

Mr Thomas: The committee appreciates your coming here, Mr. Warner. You are doing a splendid job. We only wish that it could be carried through into some of the other companies. If at any time you have any ideas as to how you can work out the situation with the other producers in order to accomplish just what you have been doing I think it would be helpful to the country. [P. 52, Oct. 20, 1947.]

* * *

Rep. Vail. Now, we have touched upon the writers that were dismissed. But we all have knowledge of a large number of actors who are generally known to have communistic sympathies and are contributors to the Communist war chest. It would seem to me that your organization would recognize the fact that the American people are not interested in viewing the pictures in which actors appear who have communistic leanings. It would seem to me that this organization should concern itself with cleaning house in its own industry.

You pointed out what the organization was not organized for, but you didn't touch upon the reason, the actual reason or reasons for its existence. I take it for granted that the reason is the betterment and the improvement of the industry. I don't think that you can improve the industry to any greater degree and in any better direction than through the elimination of the writers and the actors to whom definite communistic leanings can be traced. [P. 53, Oct. 20, 1947.]

* * *

Rep. Vail. I know he is sincere. I think you are, too, but, of course, we have the problem of eliminating the communist element from not only the Hollywood scene but also other scenes in America, and we have to have the full support and cooperation of the executives from each of those divisions." [P. 66, Oct. 20, 1947.]

* * *

Rep. Vail. If you have succeeded so admirably in cleaning out the Communist element, and their fellow travelers from your studio, won't you agree then it is possible for all of the other producers to do likewise?

Mr. (Sam) Wood. Well, you must consider that I am just one outfit. I have one writer; I may have two writers working, and that is the limit. They have probably 40 or 50 of them working and when they get around to it I think you will get action from those gentlemen, too. [P. 66, Oct. 20, 1947.]

* * *

Mr. Sam Wood. Some of them, I think, want to be intellectuals. I think they have different reasons, but we cannot quite figure out how they can dominate these people, Americans, and make them do things they do. There are some of them back there now.

The Chairman. We will take care of them when their turn comes.

Mr. Wood. I will help you, sir.

Mr. Wood (Congressman). If they were all eliminated from the picture, would it, in your opinion, weaken the effectiveness of the picture industry or the purpose for which it is organized?

Mr. Wood. Definitely not. [P. 67, Oct. 20, 1947.]

* * *

Mr. Stripling. Who would the responsibility rest with for cleaning the Communists out of the motion picture industry?

Mr. Rupert Hughes. Well, I think the producers in general should do it because they are the people who hire and fire. I think they have been unjustifiably lax. They have paid from $2,000 to $5,000 a week to men whom they know to be brilliant. Many Communists are very, very brilliant. They permit them to as little poison in." [P. 131, Oct. 21, 1947.]

* * *

The Chairman. . . . It is very evident from the material presented by our investigative staff and the research staff that these four men have extensive Communist and Communist front records. Yet, this kind of people are writing scripts in the moving picture industry.

There will be more witnesses to come who will probably all carry out the same line. The Chair would like to point out that is one of the reasons why this Committee is investigating communism in the moving-picture industry, and it is just definite proof that there is a real reason for the investigation before these hearings.

. . . So this committee is going to continue this probe—is going to continue the hearings; we are going to do everything we possibly can to spotlight these people just like we spotlighted Fritz Kuhn or Pelley or Gerhart Eisler or Hanns Eisler, Josephson, Eugene Dennis, and anyone else whom we find has a Communist record. It will be beneficial to the American people and it will be beneficial to the industry itself, because you are the people—you persons high up in the industry can do more to clean your own house than can anybody else, but you must have the will, and we hope that by spotlighting these Communists you will acquire that will. [P. 398, Oct. 28, 1947.]

* * *

Mr. Stripling. Are you now producing, is your company producing a picture based upon the book entitled, "Rachael" written by Howard Fast?

Mr. Dore Schary. Yes, that is a short story called "Rachael".

Mr. Stripling. Written by Howard Fast?

Mr. Schary. Yes. It was purchased—I think the studio has owned it since 1936.

Mr. Stripling. Are you familiar with the Communist record of Howard Fast?

Mr. Schary. I am familiar with it, yes.

Mr. Stripling. He is a publicly avowed Communist?

Mr. Schary. Yes; that is right.

Mr. Stripling. You have no objection, then, to producing the works of Communists?

Mr. Schary. The point I want to make, Mr. Stripling, is that I did not purchase the story Rachael. That was purchased before I got there. When I got there and reviewed the material there was a script already written, a script of Rachael, and I found it, I must say, a very charming story, not political whatsoever. It is a picture of American pioneer life in the early 1800's and, as a matter of fact, the film has been completed. There is nothing whatever political in it. [P. 476, Oct. 29, 1947.]

* * *

Rep. Vail. Now, in your own case, you have admitted that Hanns Eisler was employed in your studio for some little time; you associated with him, and yet it took this committee to alert you insofar as the real nature of his activities were concerned; isn't that true?

Mr. (Dore) Schary. Yes, As I said, I did not know Hanns Eisler was a Communist until—or reputedly a Communist, I should, until this record was shown to me—until, rather, I heard it before. The point I make, however, was that he was not employed by me at the time. The question of employment then came up later on with Mr. Stripling. As far as the other points you make, Mr. Congressman, certainly I believe that America

and the American people should be alerted and very vigilantly (*sic*) about their prerogatives.

My point is that they are. I believe they are very alert and very vigilant and this is why communism, I believe, has not gotten any kind of a hold politically in the United States whatever. I don't think it has anything to offer the American people. [P. 477, Oct. 29, 1947.]

* * *

The Chairman. . . . I want to emphasize that the committee is not adjourning sine die, but will resume hearings as soon as possible. The committee hearings for the past two weeks have clearly shown the need for this investigation. Ten prominent figures in Hollywood whom the committee had evidence were members of the Communist Party were brought before us and refused to deny that they were Communists. It is not neeessary for the Chair to emphasize the harm which the motion-picture industry suffers from the presence within its ranks of known Communists who do not have the best interests of the United States at heart. The industry should set about immediately to clean its own house and not wait for public opinion to force it to do so. [P. 522, Oct. 30, 1947.]

* * *

C. Opposition of Motion Picture Industry to Proposed Blacklist.

Mr. Stripling. . . . Now, as an executive of RKO Keiths, what is the policy of your company with regard to the employment of people who are notoriously international Communists?

Mr. (Dore) Schary. That policy, I imagine, will have to be determined by the president, by the board, and by myself. I can tell you personally what I feel. Up until

the time it is proved that a Communist is a man dedicated to the overthrow of the Government by force or violence, or by any illegal methods, I cannot make any determination of his employment on any other basis except whether he is qualified best to do the job I want him to do. [P. 470, Oct. 29, 1947.]

* * *

The Chairman. In view of the testimony that was presented to the Un-American Activities Committee, concerning Hanns Eisler and knowing him now as a Communist, and knowing also the record of both Gerhart Eisler and Hanns Eisler, would you as a studio executive be willing to hire him now?

Mr. Schary. As I told Mr. Stripling, if there is evidence to support the charge that he is dedicated to the overthrow of the Government by force I would not hire him. I would hire no such man because I believe he would not be dedicated to the best interests of America.

The Chairman. Just let's forget that for a second, and think of Hanns Eisler.

Mr. Schary. Yes, sir.

The Chairman. You have read a lot about Hanns Eisler lately?

Mr. Schary. Yes, sir.

The Chairman. Would you be willing to rehire Hanns Eisler?

Mr. Schary. I think, Mr. Thomas—and I really don't want to be evasive, and I don't want you to assume that I am—I can only judge in terms of the record. Now, I have been asked by Mr. Stripling that if, on the record, I was shown that this man had been definitely proven that he was dedicated to the overthrow—that the Communist

Party was dedicated to the overthrow of the Government—of course I would not hire him. But I cannot judge that until it is a part of the proven record. I think I must do that as a citizen.

The Chairman. All right. Well, supposing it is not called to your attention that the Communist Party is dedicated to the overthrow of the Government by force or violence, but knowing the record of Hanns Eisler—just think in terms of Hanns Eisler—having read what you have about Hanns Eisler, are you willing to rehire Hanns Eisler?

Mr. Schary. Well, you get into a completely different area. You are confusing me between a matter of a principle and a matter of whether I would, as an executive in charge of motion pictures, hire Hanns Eisler.

The Chairman. I am talking about you now as an executive.

Mr. Schary. As an executive, I can only repeat and maintain that position, Mr. Chairman, which I think is a very rational position as a citizen. I will hire only those people I believe best qualified for their jobs until it is proven, until it is a matter of record, and if that record is shown to me of course I would not hire anyone who is dedicated to the overthrow of the Government by force.

The Chairman. All right, but supposing we can prove that Hanns Eisler was a Communist and was very active as an international Communist—

Mr. Schary. Yes.

The Chairman. But there has never been any proof, we will say, that he advocated, personally advocated, the overthrow of the Government by force or violence.

Mr. Schary. Yes.

The Chairman. Knowing the record as you do—in all newspapers now—would you rehire Hanns Eisler?

Mr. Schary. I have to answer that in two parts, and I again don't want to seem evasive.

One part is that I don't know whether I would hire Mr. Hanns Eisler because of his particular qualifications as a musician. The second, there has been a ruling, I believe, in the Supreme Court which prohibits me as an American to arbitrarily refuse employment to a man purely because of his politics. I believe that was adjudicated by the Supreme Court and I cannot, as an American, refuse that.

What I might feel personally about that would be another thing.

The Chairman. Therefore, assuming that Hanns Eisler is a great artist; assuming also that he is a Communist, you would not hesitate to rehire him?

Mr. Schary. I would not hesitate to rehire him if it was not proven that he was a foreign agent. I would still maintain his right to think politically as he chooses.

The Chairman. Have you ever heard of Rip Van Winkle?

Mr. Schary. Yes, sir; many years ago.

The Chairman. Well, I want to tell you something. If some people in the United States don't wake up and get out of the long sleep we will find some of the difficulties here that they have encountered in France and Italy and Yugoslavia and Poland and Finland, and some of these South American countries. It is the Rip Van Winkle opinion that has been permitting communism to grow throughout the world the way it has. [Pp. 471-2, Oct. 29, 1947.]

* * *

Mr. Stripling. You heard them refuse to answer the question whether or not they are members of the Communist Party, did you not?

Mr. Schary. Yes, sir.

Mr. Stripling. Will you continue to employ them?

Mr. Schary. They are under contracts to RKO. They were employed by RKO before I came there. My association with both Mr. Scott and Mr. Dymtryk has been very professional. As an executive I have consulted with them on films. I can only say this, Mr. Stripling, I do not know what these men in their minds are pledged to.

It would come to me as a very terrible shock if I found out that these charges being made here in terms of their being foreign agents are true. That would come to me genuinely as a very surprised shock, but I must say, not in defense but in honesty, that at no time in discussions have I ever heard—or films—these men make any remarks or attempt to get anything subversive into the films I have worked on with them. I must say that in honesty.

Mr. Stripling. Well, Mr. Schary, you saw them here this afternoon given every opportunity to answer the questions—

Mr. Schary. Yes, sir.

Mr. Stripling. Whether or not they were ever a member of the Communist Party.

Mr. Schary. That is right, sir.

Mr. Stripling. You have heard the investigator for this committee read the name, date, number, and place of their Communist membership.

Mr. Schary. That is right, sir. [P. 473, Oct. 29, 1947.]

* * *

Mr. Smith (Committee Investigator). If a studio releases a person who is suspected of communistic activities would he be blackballed in other studios?

Mr. James K. McGuinness. No.

Mr. Smith. What would happen, in your opinion?

Mr. McGuinness. Hitherto he has usually been promptly hired and sometimes, or perhaps frequently, at an increased salary.

Mr. Smith. Do you think that is a bad situation in the industry?

Mr. McGuinness. I would like to answer that a little at length.

I believe there is no legal obligation on anybody to hire anybody, nor is there any legal compulsion on anybody to fire anybody. I would regret that any man was deprived of his livelihood for his political opinions no matter how abhorrent those opinions are to me.

I think, however, there is an obligation on the Congress of the United States as great or greater than on the citizens, who have sworn to defend this country against all its enemies, foreign or domestic, to recognize that we have in our midst an active fifth column, a group of Quislings who intend to destroy our form of government in the service of a foreign ideology.

Mr. Smith. How many writers would you think the industry would lose; that is, top-flight writers, if all the Communist writers were released?

Mr. McGuinness. Among the important writers, that is, the actually top-flight writers, somewhere between 10 and 15.

Mr. Smith. How many pictures a year do you think the studios would lose?

Mr. McGuinness. Well, if those 10 or 15 writers were more productive than usual, the same number of pictures.

Mr. Smith. In other words, do you think it would materially hurt the studio operation?

Mr. McGuinness. Not in my opinion.

Mr. Smith. Do you know of any reasons why the studios tended not to release these individuals?

Mr. McGuinness. Yes. To tell you that I must try, as briefly as possible, to sketch the studio situation.

Each studio has as paid employees a staff of producers who have the ultimate responsibility for the production of individual pictures. It is a highly competitive business and each of these men, since he is held responsible for the ultimate success or failure of the pictures, has great latitude in the selection of the writer who will prepare the script, and frequently the director who will direct the picture.

He usually has a very great say in the casting of the picture. That trust must be imposed on him by the head of the studio who cannot personally produce each picture.

These men charged with production are primarily showmen and not men deeply informed on the dialectics of communism. They are more concerned with getting the best possible script than with anything else.

If some writer who has had a number of successes is available at the time they start a script, they will exercise every effort to get him because a good script is the primary insurance of a successful picture.

I doubt that any of the heads of studios participate in the selection of the writers assigned to each script. I think it is humanly impossible with their other duties for

the men running the studios to go that deeply into the detail of production. [Pp. 141-2, Oct. 22, 1947.]

* * *

Rep. Vail: Wouldn't such an association provide a splendid piece of machinery for distribution of information between producers as to the type of individuals that are employed by the industry and who are concerned with subversive activities?

Mr. (Jack) Warner: Of course, that has never been brought up in the Association in any manner, shape or form, by word or written form, to my knowledge. I am rather active in the Association. Of course, I don't believe it would be legal in my opinion—speaking only personally—to have the Association or any men band together to obstruct the employment of any other man.

I don't believe the Association would have anything whatsoever to do with that type of operation. I would not be a party to it and neither would any of the other men, from my knowledge of them.

Rep. Vail. Since we recognize the fact that motion pictures represent a forcible vehicle for the distribution of subversive information it would seem to me that would be a very important bit of business for your Association. [P. 18, Oct. 20, 1947.]

* * *

Rep. Wood. Mr. Warner, I can of course appreciate the extreme difficulties confronting producers of pictures in undertaking to screen every employee engaged in the various activities of the picture industry, but what I am concerned with is to ascertain whether or not there is now any producer in America or responsible studio head who knowingly maintains under this employment

any person who undertakes to inject into pictures un-American doctrines or ideologies which seek to weaken or destroy the form of government under which this nation has grown to its place amongst the nations of the earth. Do you know of any such producer, and if so, I would like to have the name.

Mr. Warner: I personally do not know anyone employing anyone who is willfully or otherwise endeavoring to do anything to the system of American government. As I said earlier, it is—what I have read—certain writers have a membership in Communistic parties. Some of them haven't denied it after being accused by the press, so I don't know whether they stand convicted, or not. I am not the one to judge whether they are Communists or not. [P. 31, Oct. 20, 1947.]

* * *

Mr. Stripling. When you employed Mr. Cheyfitz were you aware that there was sworn testimony before a committee of Congress that he was a member of the Communist Party? That his mother was a member of the Communist Party? That they had both been members of the Communist Party for some time?

Mr. (Eric) Johnston. He told me he was a member of the Communist Party. I assumed that was sufficient.

Mr. Stripling. That made no difference to you?

Mr. Johnston. After getting the recommendations I did about him and for him, I felt he was a man that could be well employed. [P. 317, Oct. 27, 1947.]

* * *

D. Censorship as an Objective of the Committee and the Industry's Opposition Thereto.

Mr. Smith (Committee Investigator). Are you making any anti-Communist pictures at Metro-Goldwyn-Mayer at the present time?

Mr. (Louis B.) Mayer. I think the one we are going to start shooting promptly—(laughter)—we have been preparing it for some six months.

The Chairman. Mr. Mayer, these hearings haven't anything to do with the promptness, have they?

Mr. Mayer. No, no, it is just out now, called "Vespers in Vienna." [P. 76, Oct. 20, 1947.]

* * *

Mr. Smith. You mentioned a few pictures a while ago that you thought were pro-Soviet pictures. During the time those pictures were made were there any anti-Communist pictures made by any of the studios, to your knowledge?

Mr. (James K.) McGuinness. Not during the war period. Mr. Mayer mentioned two made at my studio, Ninotchka and Comrade X, prior to the outbreak of the war.

Mr. Smith. Do you think some anti-Communist pictures should be made?

Mr. McGuinness. I certainly do.

Mr. Smith. Do you mean shorts or full-length pictures, or both?

Mr. McGuinness. Both.

The Chairman. Right along that point, Mr. McGuinness, why is it they are not being made?

Mr. McGuinness. It takes a long while from the inception of the idea of producing a picture until it actually

gets before the screen. Sometimes it takes a year's work on the script, sometimes 2 years' work. You have to find a story. You must remember it is not so long since Russia was our ally. Nobody at that time wanted to make an anti-Communist picture.

It took some time for the hope that we would eventually reach an understanding with Russia to fade. I think now some studios have already found strong anti-Communist material, and others are searching for it.

I think that when the first picture is made public reaction to it will determine how many more will or will not follow.

The Chairman. Well, has the industry the will to make anti-Communist pictures.

Mr. McGuinness. I think the industry is acquiring it.

* * *

The Chairman. Mr. McGuinness, will these public hearings aid the industry in giving it the will to make these pictures?

Mr. McGuinness. It is my opinion that they will. [Pp. 144-145, Oct. 22, 1947.]

* * *

Rep. Thomas. Now, it is 1947. Do you believe it [Mission to Moscow] is pro-Communist?

Mr. Stripling: Would you release the film now, in other words?

Mr. (Jack) Warner: No, we would not release the film now.

Rep. Thomas: Why not release the film now?

Mr. Warner: Because of the way Russia is handling international affairs since the cessation of the war. I

consider in my opinion as an American that they are advocating Communism throughout the world and I am not in any shape, manner or form in favor of anything like that. In fact, I despise and detest the very word. [Pp 33-34, Oct. 20, 1947.]

* * *

Mr. Warner. We made the film to aid in the war effort, which I believe I have already stated.

Mr. Stripling. Whether it was true or not?

Mr. Warner. As far as I was concerned, I considered it true to the extent as written in Mr. Davies' book.

Mr. Stripling. Well, do you suppose that your picture influenced the people who saw it in this country, the millions of people who saw it in this country?

Mr. Warner. In my opinion, I can't see how it would influence anyone. We were in war and when you are in a fight you don't ask who the fellow is who is helping you.

Mr. Stripling. Well, due to the present conditions in the international situation, don't you think it was rather dangerous to write about such a disillusionment as was sought in that picture? [P. 39, Oct. 20, 1947.]

* * *

Mr. (Adolphe) Menjou. . . . If you want to ask me if I know of any un-American propaganda in any pictures that I appeared, I will be glad to give you my thoughts.

Mr. Stripling: Will you give an example?

Mr. Menjou: I don't think the picture "Mission to Moscow" should have been made." [P. 93, Oct. 21, 1947.]

* * *

Mr. Smith. Do you recall scenes in there at the night club where everybody was drinking ("Song of Russia")?

Mr. Mayer. They do in Moscow.

Mr. Smith. Do you feel that that represents Russia as it is today?

Mr. Mayer. I didn't make it as it is today, I made it when they were our ally in 1943.

Mr. Smith. Do you feel it represents Russia in 1943 as conditions were in Russia?

Mr. Mayer. That is what I understood, that they go to night clubs there in Moscow. If only the rest of the Russians had a chance to do the same thing, it would be fine, but they don't. This picture was laid in Moscow. [P. 76, Oct. 20, 1947.]

* * *

Mr. Stripling. Now, Mr. Mayer, you stated that you recently viewed the picture.

Mr. Mayer. Yes, sir.

Mr. Stripling. Is it your opinion that there were no political implications in it whatsoever?

Mr. Mayer. I am convinced of that. I am under oath, and if I met my God I would still repeat the same thing. [P. 81, Oct. 20, 1947.]

* * *

Miss Ayn Rand. Nobody has stated just what they mean by propaganda. Now, I use the term to mean that Communist propaganda is anything which gives a good impression of Communism as a way of life. Anything that sells people the idea that life in Russia is good and that people are free and happy would be Communist

propaganda. * * * He starts playing the American National Anthem and the National Anthem dissolves into a Russian mob, with the sickle and hammer on a red flag very prominent above their heads. * * * and I am only a naturalized American. That was a terrible touch of propaganda. [P. 83, Oct. 20, 1947.]

* * *

. . . Then you see a Moscow restaurant that just never existed there. In my time, when I was in Russia, there was only one such restaurant, which was nowhere as luxurious as that and no one could enter it except commissars and profiteers. Certainly a girl from a village, who in the first place would never have been allowed to come voluntarily, without permission, to Moscow, could not afford to enter it, even if she worked 10 years. However, there is a Russian restaurant with a menu such as never existed in Russia at all and which I doubt even existed before the revolution. From this restaurant they go on to this tour of Moscow. The streets are clean and prosperous-looking. There are no food lines anywhere. You see shots of the marble subway—the famous Russian subway out of which they make such propaganda capital. There is a marble statute of Stalin thrown in. There is a park where you see happy little children in white blouses running around. I don't know whose children they are, but they are really happy kiddies. They are not homeless children in rags, such as I have seen in Russia. [p. 84.]

* * *

. . . Such an idea that every farmer, a poor peasant, has a radio, is certainly preposterous. You may see that they have long-distance telephones. Later in the picture Taylor has to call his wife in the village by long-distance

telephone. Where they got this long-distance phone, I don't know. [P. 86.]

* * *

. . . Suddenly there is a Nazi attack on them. The poor, sweet Russians are unprepared. [P. 86.]

* * *

Now, then, the heroine decides that she wants to stay in Russia. Taylor would like to take her out of the country, but she says no, her place is here, she has to fight the war. Here is the line, as nearly exact as I could mark it while watching the picture: "I have a great responsibility to my family, to my village, and to the way I have lived." What way had she lived? This is just a polite way of saying the Communist way of life. She goes on to say that she wants to stay in the country because otherwise, "How can I help to build a better and better life for my country." What do you mean when you say better and better? That means she has already helped to build a good way. That is the Soviet Communist way. But now she wants to make it even better. All right. [Pp. 86-87.]

* * *

Now, then, Taylor's manager, who is played I believe by Benchley, an American, tells her that she should leave the country, but when she refuses and wants to stay, here is the line he uses: He tells her in an admiring friendly way that "You are a fool, but a lot of fools like you died on the village green at Lexington."

Now, I submit that that is blasphemy, because the men at Lexington were not fighting just a foreign invader. They were fighting for freedom and what I mean—and I intend to be exact—is they were fighting for political

freedom and individual freedom. They were fighting for the rights of man. To compare them to somebody, anybody fighting for a slave state, I think is dreadful. [P. 87.]

* * *

Rep. Wood. It portrayed the people of Russia in a better economic and social position than they occupied?

Miss Rand: That is right. [P. 88.]

Rep. McDowell: You paint a very dismal picture of Russia. You made a great point about the number of children who were unhappy. Doesn't anybody smile in Russia any more?

Miss Rand: Well, if you ask me literally, pretty much no.

Rep. McDowell: They don't smile?

Miss Rand: Not quite that way, no. If they do, it is privately and accidentally. Certainly, it is not social. They don't smile in approval of their system.

Rep. McDowell: Well, all they do is talk about food.

Miss Rand. That is right.

Rep. McDowell: That is a great change from the Russians I have always known, and I have known a lot of them. Don't they do things at all like Americans? Don't they walk across town to visit their mother-in-law or somebody?

Miss Rand. Look, it is very hard to explain. It is almost impossible to convey to a free people what it is like to live in a totalitarian dictatorship. I can tell you a lot of details. [P. 90, Oct. 20, 1947.]

* * *

Mr. Smith. Mr. McGuinness, in your opinion were any pictures made during the period June 1941 through 1945 which you would consider pro-Communist pictures?

Mr. McGuinness. During the period of the war, when I would prefer to call them pro-Soviets more so than pro-Communist, there were three pictures made which have been discussed before this Committee: Mission to Moscow, which, in my opinion, distorted history; North Star, and Song of Russia, which represented Russia as a never-never land, flowing with milk and honey. I never regarded them too seriously since they were made during the war. In fact, I looked on them as a form of intellectual lend-lease. [P. 138, Oct. 22, 1947.]

* * *

Rep. Vail. At this stage we have no law. There is a question as to whether we shall have a law to legalize (sic) Communism. But we have to recognize that the motion picture industry is one of the channels through which is established the groundwork for the eventual destruction by force, that you spoke of a little while ago.

Don't you think it is a job of the industry, then, to prevent the insertion of the tentacles of the communistic ideology through your industry?

Mr. Warner. Speaking as an individual American, with each man in the industry having a responsibility, I feel like you do. I feel, likewise, in the free press, the radio, and the theatre to a degree more or less, that everybody is very, very cognizant of the duty that they are entrusted with, in the dissemination of the American way of life. [P. 53, Oct. 20, 1947.]

* * *

Mr. (Sam) Woods. Well, unquestionably they are always trying. It is very difficult for the American people to understand what you mean by Communist propaganda in pictures. You might refer to some picture,

something is mentioned, and they say, "That is ridiculous, there is no propaganda there," because they are looking for some howl for Stalin or showing the Russian way of life. But they don't show that. They have nothing to sell. All they want to do is to try to unsell America.

Mr. Stripling. That can be done just as effectively by leaving stuff out of pictures as by putting it in?

Mr. Woods: Yes. They don't want to show the American way of life. [P. 60, Oct. 20, 1947.]

* * *

Mr. Smith. Did you read the first script, Mr. Mayer?

Mr. (Louis B.) Mayer. Yes, sir.

Mr. Smith. What was your opinion at that time?

Mr. Mayer. They had farm collectivism in it and I threw it out and said, "This will not be made until they give me the story they told me originally when I approved the making of it."

Mr. Smith. In other words, the first script, in your opinion, was not producable?

Mr. Meyer. Not the first.

Mr. Smith. Why not?

Mr. Mayer. Because I will not preach any ideology except Americanism, and I don't even treat that, I let that take its own course and speak for itself.

Mr. Smith. That showed an ideology or condition, so far as Russia is concerned, that you did not approve of?

Mr. Mayer. I wouldn't have it.

Mr. Smith. As to the last script, then, was the script, in your opinion, satisfactorily cleaned up?

Mr. Mayer. I think so; yes, sir.

Mr. Smith. Who was responsible, if you know, for taking the collectivism, and other things, out of the script?

Mr. Mayer. I ordered it out, and the producer said it would all be rewritten, and it was. That is why Taylor was delayed getting into the service. [P. 75, Oct. 20, 1947.]

[Compare this testimony with the testimony of Ayn Rand concerning the same picture (*Song of Russia*):]

(Miss Rand). Then the peasant proceeds to show Taylor how they live. He shows him his wonderful tractor. It is parked somewhere in his private garage. He shows him the grain in his bin and Taylor says, "That is wonderful grain." Now, it is never said that the peasant does not own this tractor or this grain because it is a collective farm. He couldn't have it. It is not his. But the impression he gives to Americans, who wouldn't know any differently, is that certainly it is this peasant's private property, and that is how he lives: He has his own tractor and his own grain. Then it shows miles and miles of plowed fields... [P. 85, Oct. 20, 1947.]

* * *

The Chairman. Mrs. Rogers, what can we do to wake up the industry to produce more really American pictures?

Mrs. (Lela) Rogers. I think you are doing it.

The Chairman. You think we are doing it?

Mrs. Rogers. Yes, sir. [P. 237, Oct. 24, 1947.]

* * *

Mr. Stripling. Well, I was wondering, Mr. Johnston, since you have covered all of this by a code whether or not there is any branch of your association which has

as its purpose the detection of propaganda which might be detrimental to our system of government.

Do you have anyone, for example, who checks pictures to determine whether or not they are propaganda for a foreign government, or do they check only from a moral standpoint. How far does your code extend?

Mr. (Eric) Johnston. The chapters cover particular applications: "Crimes against the law; sex"—you have heard of that, I presume; "vulgarity; obscenity; profanity; costume; dances, religion; locations national feelings titles; and repellant subjects."

Now, there is nothing in here about propaganda. We feel that it is the duty of each motion picture producer to determine what goes on the screen, just like it is the duty of each newspaper publisher to determine what goes into a newspaper.

Mr. Stripling. You draw a line, however, there with your code, don't you?

Mr. Johnston. We draw a line only on those lines which offend a sense of morals or decency. This is all the code is supposed to cover. [P. 322, Oct. 27, 1947.]

The Chairman. There is, however, an equally dangerous phase of this inquiry which deals with Communist propaganda in various motion pictures and the techniques employed. At the present time the commitee has a special staff making an extensive study of this phase of the committee's inquiry. Either the full committee or a subcommittee will resume hearings on this matter in the near future, either in Washington or in Los Angeles, at which time those persons whose Communist records the committee has will be given an opportunity to appear before the committee to confirm or deny those affiliations. We will also have a number of witnesses who will deal

with propaganda in the films and the techniques employed. [P. 522, Oct. 30, 1947.]

* * *

Mr. (Jack) Warner. There is one little thing where the fellow on the train said, "My name is Jones, so I can't get a job." It was this kid named Diamond, a Jewish boy, in the Marines, a hero at Guadalcanal. * * * Some of these lines have innuendos and double meanings, and things like that, and you have to take eight or ten Harvard law courses to find out what they mean. [P. 15, Oct. 20, 1947.]

* * *

The Chairman. Don't you think it would be very foolish for a Communist or a Communist sympathizer to attempt to write a script advocating the overthrow of the Government by force or violence?

Mr. Warner. It would not only be foolish, it would be something they could not get away with in the American motion picture industry in California, or anywhere else.

The Chairman. Exactly. So what would they do? They would put in slanted lines wherever they could and that is what you have been trying to keep out?

Mr. Warner. That is correct.

The Chairman. That is why you have been doing exactly the same thing in your business that we have been attempting to do in ours?

Mr. Warner. That is correct.

The Chairman. You have detected these slanted lines, lines that Communists or un-Americans, as you call them, would try to put in? [P. 17, Oct. 20, 1947.]

Mr. Menjou. Oh, yes, I believe that under certain circumstances a Communistic director, a Communistic writer, or a Communistic actor, even if he were under orders from the head of the studio not to inject Communism or un-Americanism or subversion into pictures, could easily subvert that order, under the proper circumstances, by a look, by an inflection, by a change in the voice. I think it could be easily done. I have never seen it done, but I think it could be done.

Mr. Stripling. You don't know of any examples?

Mr. Menjou. I cannot think of one at the moment, no, sir. [Pp. 94-95, Oct. 21, 1947.]

* * *

Mr. Stripling. Can you tell the committee whether or not in the past there have been efforts to discredit certain institutions of the American government by constantly referring to the members of Congress as being crooks, and so forth, in the pictures?

Mr. (Sam) Wood: I think there has been an effort. Of course, if you go back in pictures you will find frequently the banker or the man in public life, the doctor, any one of them would be the heavy in the picture. I think it is particularly bad if that is constantly shown; every night you go to the pictures you see a dishonest banker, or Senator, you begin to think that the whole system is wrong. That is the way they work on it. They figure if you can break down or destroy the confidence of the people in the government, or the gentlemen who are executing it, then it is a very simple thing to have a new idea for them—and, believe me, they have got one for you, too. [P. 61, Oct. 20, 1949.]

* * *

Mr. (Jack) Moffit. * * * There is also the campaign against religion, where the minister will be shown as the tool of his richest parishioner, where it will be inferred that the policies of an entire diocese, let us say, of the Episcopal Church, are dictated by a rich reactionary woman, where it will be inferred that an honest clergyman is interferred with in his duties to the poorer members of his diocese by rich and reactionary women.

There has also been the Party line of making the returned soldier fear that the world is against him, that the American principle is against him, that business is against him, that the free enterprise system is against him. You will see picture after picture in which the banker is presented as an unsympathetic man, who hates to give a GI a loan. In connection with that, I have a note here, based on my own inquiry, that I would like to read. [P. 122, Oct. 21, 1947.]

* * *

Mr. Moffit. Mr. Lavery follows the Communist tactic of scaring Americans to death with their own atom bomb. Ever since the armistice it seems to me that the people of the United States have been engaged in one of the great moral experiments in the history of mankind. For the first time, a people have had in their hands an invincible weapon and their sole concern has been, how not to use it. In exchange for that, the leftists have called us warmongers. They have insisted that we are imperialists, though we have taken no territory and the Russians have. And they have persistently insisted that if we didn't behave ourselves, if we didn't cease to be warmongers, if we didn't cease to be imperialists who get nothing, that we would be blown to death by our own atom bomb.

Now, Mr. Lavery promotes that same idea in this play. One line says, "I met a Russian the other day. He wanted to bet me the Russians could smash just as many atoms as we could. But I was smart. I wouldn't bet him." There is another line. The heroine's brother remonstrating with her for having spent her last thousand dollars to go to Europe to escape from the air of Washington, which she found very oppressive, says, "Sure, but I'm a pretty smart fellow, getting smarter all the time. I didn't have to take my last thousand dollars and throw it away on one last look at the vanishing continent of Europe. No, sir. I save my money. I got all the disillusionment I wanted right here at home. I just stood up night after night in the best Washington bars with the best Senators and the best Congressmen and the best everybody, and you know what, I feel just as awful as you do and I never left home at all." [Pp. 123-124, Oct. 21, 1947.]

* * *

Mr. Moffit. I might also add that Mr. Lavery—I don't want to bore you with these lengthy quotations, unless you wish to hear them, but he also strongly advocates that the United States abandon its sovereignty and abandon its sovereignty to become part of a world state. In the course of the play, he admits that the Russians don't want to do that either, but his excuse is that the Russians have had their soverignty just a little while and we shouldn't be impatient if they wish to enjoy it for some time—but that we have had it long enough that we should be willing to give it up. [Pp. 125, 126, Oct. 21, 1947.]

* * *

Mr. Moffit. Forty-four out of 100 of the best plays produced on Broadway from 1936 through the season

of 1946 have contained material to further the Communist Party line. Nothing like that has occurred in Hollywood. 233 other plays produced during the same period favored the party line.

Mr. Stripling. Mr. Moffit, this is all your opinion as a critic; is that right? [P. 114, Oct. 21, 1947.]

* * *

Mr. Stripling. Have you ever had any personal encounter with any Communist writers who have sought to place propaganda in pictures which you were directing?

Mr. (Leo) McCarey. Yes, I have.

Mr. Stripling. Would you detail that instance to the committee?

Mr. McCarey. I have had many experiences where ideas were suggested by myself and they would throw cold water on them if they did not agree with their own policy. They were always submitting books for me to read and I always had to be on the alert to find the latent Communist propaganda in the stories they had me read.

Mr. Stripling. It is very subtle, in other words. [P. 226, Oct. 23, 1947.]

* * *

Mr. (Jack) Warner. * * * The Epstein brothers worked on a picture called Animal Kingdom. As I recall, that was aimed at the capitalistic system—not exactly, but the rich man is always the villain. [P. 44, Oct. 20, 1947.]

* * *

Mr. Warner. * * * John Garfield played the part of the boy and he was mad at Joan Crawford for romantic reasons and said, "Your father is a banker." He was

alluding to the fact she was rich and had all of the money. He said, "My father lives over a grocery store," that is very, very subtle, but if you see the film with those lines in it you will see the reason for it. But it is not in the film. I eliminated it from the script. Sometimes you eliminate those things and they leave them in because it plays good and everybody is trying to be a Voltaire. All these writers and actors want to "Voltaire" about freedom of press and freedom of speech. I can go on if you want me to. [P. 44, Oct. 20, 1947.]

* * *

Mr. Moffit. A number of pictures have shown the banker as the villain, pictures dealing with returned veteran. [P. 122, Oct. 21, 1947.]

* * *

Mr. Moffit. Yes, sir. Emmett Lavery is the president of the Screen Writers Guild. His opinions upon the Congress I think are set forth in a play which is now the subject of a $2,000,000 libel suit. The play is called "The Gentleman from Athens". In the character of Cousin Vincent, the banker, Mr. Lavery follows the line of making him a very unsympathetic character, just because he is a banker. We are never told that he has done any specific thing that is villainous, but in relation to him there are such lines as "You have to know him before you begin to despise him". The mere sight of him scares the heroine into the jitters. That attitude toward him is maintained throughout the play, though no specific act is charged against him. [P. 123, Oct. 21, 1947.]

* * *

Mr. Stripling. As a director, Mr. McCarey, what do you think the dangers are of permitting pictures to be

made in which the institutions in this country are portrayed in a disparaging light? In other words, if pictures are made which always have the banker as a heavy, as it has been referred to in the testimony, and that picture is shown in foreign countries, Europe, and so on, what do you think the ultimate effect would be?

Mr. McCarey. Well, naturally, it would give a very unfavorable opinion of people who are successful in the United States.

Mr. Stripling. Do you think that is a dangerous practice for the motion pictures to pursue?

Mr. McCarey. I think it is a very dangerous practice. [P. 226, Oct. 23, 1947.]

* * *

Mr. Stripling. Do you know whether or not Mr. Odets was successful in injecting any propaganda into the film?

Mrs. (Lela) Rogers. I have here under date line of October 2, 1944, a copy of the Hollywood Reporter with a review of None but the Lonely Heart. The Hollywood Reporter is a Hollywood trade paper. I will read the criticism that I read at that time:

"The story, pitched in a low key, is moody and somber throughout, in the Russian manner and plods inexorably to its gloomy ending with only slight redemption in the ray of hope expressed in one of the final speeches. For the most part it moves slowly and takes time out for a bit of propaganda preachment whenever Director Clifford Odets, who also wrote the script for the Richard Lewellyn novel, felt the urge."

Mr. Stripling. Would you say that was a typical example of how a Communist would be successful in injecting propaganda? They refer there—they use the language, I believe, "propaganda preachment."

Mrs. Rogers. That is right. I think that this is a splendid example, this picture, of what type of propaganda Communists like to inject in motion pictures. [P. 232.]

* * *

Rep. McDowell. Mrs. Rogers, you had devoted many years to the reading of manuscripts and the study of pictures in general. You make the statement here that there was Communist propaganda, as you detected it, in this film None But the Lonely Heart. I haven't heard any description of Communist propaganda in these films yet except that a banker was shown occasionally as being a no-good, and so forth. Well, of course, I know many fine bankers, many patriotic men. I also know some stinkers that should have been in jail 30 years ago. That doesn't necessarily constitute the Communist propaganda. What would you describe in his film as being Communist propaganda?

Mrs. Rogers. In None But the Lonely Heart?

Rep. McDowell. Yes.

Mrs. Rogers. I can't quote the lines of the play exactly but I can give you the sense of them. There is one place in which—it is unfair, may I say, to take a scene from its context and try to make it sound like Communist propaganda, because a Communist is very careful, very clever, and very devious in the way he sets the film. If I were to give you a line from that play straight out you would say, "What is wrong with that line?" unless you knew that the Communist is trying in every way to tear down our free-enterprise system, to make the people lose faith in it; so that they will want to get something else, and the Communists have it waiting for them.

I will tell you of one line. The mother in the story runs a second-hand store. The son says to her, "You are not going to"—in essence, I am not quoting this exactly because I can't remember it exactly—he said to her, "You are not going to get me to work here and squeeze pennies out of little people poorer than I am."

Now, laid upon the background of—that is the free-enterprise system—trade, and we don't necessarily squeeze pennies from people poorer than we are. Many people are poorer and many people are richer.

As I say, you find yourself in an awful hole the moment you start to remove one of the scenes from its context. [P. 234, Oct. 24, 1947.]

* * *

The Chairman. Let me ask you one more question. Do you think that communism is on the increase or on the decrease out in Hollywood?

Mr. (Gary) Cooper. It is very difficult to say right now, within these last few months, because it has become unpopular and a little risky to say too much. You notice the difference. People who were quite easy to express their thoughts before begin to clam up more than they used to. [P. 224, Oct. 23, 1947.]

* * *

(Mr. Johnston.) When I talk about freedom of speech in connection with this hearing, I mean just this: You don't need to pass a law to choke off free speech or seriously curtail it. Intimidation or coercion will do it just as well. You can't make good and honest motion pictures in an atmosphere of fear.

I intend to use every influence at my command to keep the screen free. I don't propose that Government shall

tell the motion picture industry, directly or by coercion, what kind of pictures it ought to make. I am as wholeheartedly against that as I would be against dictating to the press or the radio, to the book publishers or to the magazines. [P. 307, Oct. 27, 1947.]

* * *

E. The Motion Picture Industry's Overall Statement of Policy as Presented to the Committee.

[Mr. (Eric) Johnston, president of the Motion Picture Producers Association, testified as follows with respect to action taken by the Motion Picture Producers Association prior to the hearing in October 1947. [P. 312 *et seq.*, Oct. 27, 1947.]]

Mr. Johnston (reading):]

"The Association of Motion Picture Producers today were asked to adopt a three-point program to meet the issue of communism in Hollywood and to secure a fair and dignified representation of the facts on the motion-picture industry to the American people. The program proposed that:

"1. Insistence upon a fair and objective investigation by the Thomas Un-American Committee. Vague blanket charges that communism had captured the American screen before responsible witnesses have been heard by the entire committee is not in the American tradition. Nothing can be accomplished by smearing all of Hollywood with the brush of communism. Script burning and head hunting are un-American techniques. We want the facts, hard, specific facts, and that kind of an investigation we invite.

"We want the facts so that we will know whether we are exonerated or condemned.

"Our industry is determined at this time that we shall have a complete and decisive investigation. This must be an investigation to end all investigations in Hollywood.

"Hollywood is weary of being the national whipping boy for congressional committees. We are tired of having irresponsible charges made again and again and again, and not sustained. If we have committed a crime we want to know it. If not, we should not be badgered by congressional committees.

"We are a responsible industry and we would like to spend our time making pictures and not dissipate our energies and our efforts in responding to committee investigations.

"2. Agreed not to employ proven Communists in Hollywood jobs where they would be in a position to influence the screen. Hollywood producers recognize the responsibility to keep the American screen free from Communists or any other subversive propaganda. The evidence is conclusive that Communists are a destructive force and their constant under-cover activities are designed to create chaos and conflict.

"We reject the Communist not because of his ideas but because of his allegiance and loyalty to a foreign power. Every American Communist is a potential foreign agent. America has never been afraid of new ideas. We welcome them in all fields, political, economic, and social.

"The free play of ideas is the strength of our democracy. It is the completion of ideas which makes America strong. Sedition is not competition, and this industry will not tolerate seditionists; but we must make sure we do not chip away our freedoms to get the seditionists.

"The protection of the innocent is still supreme. There is no higher duty under our American system of juris-

prudence. We must be scrupulous to avoid indiscriminate labeling. Every time you tag an innocent person with a red label you play into the hands of the Communists.

"I am not interested in the pastel shades, the parlor pinks or salmon-colored zealots. They are just plain dupes and fools. My concern is the Red conspirator, the man who uses the freedoms of democracy to destroy democracy.

"We emphasize that in agreeing not to employ proven Communists we mean just that. The proof must be conclusive and it is the responsibility of the Un-American Committee to furnish the proof and the names.

"3. The employment of James Byrnes, former Secretary of State, to represent the Association of Motion Picture Producers in counseling and presenting all the facts about the industry to the Un-American Committee and the American public.

"The record of the motion-picture industry in war and peace is unexcelled by any other industry.

"Many Americans see motion pictures daily. They not only see them, they recommend them, and they love them. That is true in every country which permits the showing of American films. We enjoy the highest prestige and standing everywhere.

"American films are vital to the American design of living because they give the lie by visual evidence to totalitarian propaganda. Our pictures produced under the democratic form of government inevitably reflect democratic habits of thought and life and action. They are

democratic habits of thought and life and action. They are bound to convey some of the virility, the zest, and joy of living which are characteristic of life in our country. These are qualities which other people need most at this time, and these are the qualities that make American films hated and feared by Communists everywhere: American motion pictures truly reflecting American life have been possible because of freedom of the screen. We intend to protect this sacred right. We are determined not to permit Communist propaganda, Government pressure, or political censorship to undermine that freedom."

Mr. Chairman, the Association of Motion Producers at Los Angeles adopted the first and the third. They did not adopt the second. The second is the agreement not to employ proven Communists in Hollywood on jobs where they would be in a position to influence the screen. They did not adopt that for several, what they thought, were very good reasons.

* * *

Mr. Johnston. The first reason assigned was that for us to join together to refuse to hire someone or some people would be a potential conspiracy, and our legal counsel advised against it.

Second, who was going to prove whether a man was a Communist or not? Was it going to be by due process of law in the traditional American manner, or was it to be arrogated to some committee in Hollywood to say he was a Communist, or some producer, and if they said he was a Communist they might at some future time find he

was a Republican, a Democrat, or a Socialist and not hire him.

In other words, who is going to prove that this man was a Communist? And under what methods?

Third, that it was the duty of Congress to determine two things: First, was a Communist an agent of a foreign government—as I believe he is—and/or second, is he attempting to overthrow our Government by unconstitutional means. Therefore, it was up to Congress to make these two determinations before we could take action.

I must confess they convinced me they were right on all three points, Mr. Chairman, and that is the reason they did not attempt No. 2.

Mr. Stripling. Did you urge the adoption of No. 2?

Mr. Johnston. I did; I urged the adoption of No. 2 but the questioning from our legal counsel present, and from the membership present, convinced me I was wrong. [Pp. 312-313, Oct. 27, 1947.]

2. Activities of the Committee With Respect to the Entertainment Industries Subsequent to the Initial Hearing of 1947.

A. Activities of the Committee With Respect to Blacklisting.

Rep. Kearney. To your knowledge, are any of the convicted Hollywood 10 writers now working for the motion-picture industry?

Mr. (Robert) Lees: Not to my knowledge. [P. 207, April 11, 1951.]*

* * *

Mr. Tavenner. I have another question. Is Mr. Hugo Butler still associated with you in a business way?

Mr. (John) Garfield: No, sir; absolutely not. He hasn't been for the last 4 months—3 months.

Mr. Tavenner. You mean since these hearings began? [P. 361, April 23, 1951.]

* * *

Rep. Kearney. Mr. Willner, do you know today of any of the convicted 10 Hollywood writers who are now writing in Hollywood under assumed names? [P. 385, April 24, 1951.]

Rep. Kearney. Do you know if any of the Hollywood writers who were convicted and served time in jail are now writing in Hollywood under assumed names or through other parties? [P. 406, April 25, 1951.]

* * *

*All references in this and succeeding sections of Appendix B are to the Hearings of the House Committee on Un-American Activities for the respective years indicated.

Mr. Tavenner. (Committee Counsel) This exhibit, Willner Exhibit No. 1, shows that These Many Years, by J. Redmond Prior, was sold to Warner Bros., for $20,000. The name of the artist, writer, and property is stated to be These Many Years, by J. Redmond Prior. Studio and individual who confirmed deal: Warner Bros., Budd Kay. It bears the date of March 1, 1948. Signature: George Willner.

* * *

With whom did you negotiate for the purchase and sale of this picture?

Mr. (George) Willner. I decline to answer for the reasons previously stated.

Mr. Tavenner: Do you know J. Redmond Prior?

Mr. Willner. I decline to answer for the same reason.

Mr. Tavenner. I now hand you a paid check marked "Paid, March 4, 1948," bearing date of March 3, 1948, payable to J. Redmond Prior, on account of the Nat Goldstone Agency, in the amount of $17,900.52, which check is endorsed on the back "J. Redmond Prior, Jeanne Cole; for deposit only." Can you identify that check and state for what purpose it was given (handing document to witness)?

* * *

Mr. Tavenner. Is it not a fact known to you, Mr. Willner, that Jeanne Cole, whose name appears on the back of that check, is the wife of Lester Cole?

Mr. Willner. I decline to answer that for the same reason.

Mr. Tavenner. And do you not also know that the maiden name of Jeanne Cole was Prior—that the last name was Prior?

Mr. Willner. I decline to answer for the same reason.

Rep. Kearney: Is Lester Cole now selling under the name of Jeanne Cole?

Mr. Willner. Mr. Kearney, I decline to answer that for the same reason previously stated. [Pp. 381-382, April 24, 1951.]

* * *

Rep. Kearney. . . . Do you have any knowledge as to whether any of the 10 Hollywood convicted writers are now selling their wares to the motion picture industry through a second or third party?

Mr. (Roy) Brewer. Well, I have some information which would indicate that that was the case, but I can't prove that that is the case.

Rep. Kearney. In other words, you have a great suspicion that that is the case.

* * *

Mr. Brewer: . . . The fellow who has any taint of communism on him today is having a tough time.

Rep. Kearney. Unless he sells his stories or writings through a second or third party?

Mr. Brewer: That is true.

* * *

Chairman Wood: In this connection, Mr. Counsel, I would like to make the statement that I have gone to some considerable pains personally to advise myself as to the attitude of responsible producers in the motion-picture industry, and I know at this time they are spending literally thousands and thousands of dollars undertaking to screen the backgrounds of all persons now employed in essential positions in the industry, and are exercising a great deal of diligence in that respect. I think

it is only fair that that be placed in the record at this time.

Rep. Kearney. I take it, the chairman includes screen writers, also?

Chairman Wood. They are employees. That goes to all employees in the industry.

Rep. Velde. Mr. Chairman, I didn't intend to convey the impression by my questions that the motion-picture industry was not cooperating fully in the hearings being conducted at the present time or in the ousting of Communist Party members from the motion-picture industry. I didn't mean to intimidate that. [Pp. 489-490, May 17, 1951.]

* * *

Mr. (Leo) Townsend. . . . I am presently employed at Warner Bros. studio as a screen writer. When I received my subpeona last week I went to the heads of the studio, told them I had a subpeona, told them what I planned to do here, that I was going to testify before the committee. They told me that my testimony would in no way affect my employment at their studio.

Rep. Walter. This committee has hoped that would be the position taken by various studios. . . . We don't feel that a man should be penalized for aiding the committee directed by the Congress of the United States to perform certain services. [P. 1509, Sept. 18, 1951.]

* * *

Rep. Doyle. Why did you go to Warner Bros. and tell them your story? . . .

Mr. Townsend. I felt I should be honest with them. If they had not known that I had been a member of the Communist Party, if they had not known that I had been subpeonaed, if they had not known that I was to appear

before this committee, I wanted to be completely honest with them. I went to them, told them I had been subpeonaed, told them I planned to testify. They said, "Your testimony will be in no way affect your employment here. We feel that anyone who cooperates with this committee is doing the industry a service."

Rep. Doyle. . . . That is certainly evidence of cooperation on the part of the employer in an effort to help clean up the mess. [P. 1530, Sept. 18, 1951.]

* * *

Rep. Wood (Chairman). I don't want to speak for the remaining members of this committee but if, by any action of this committee, we could be instrumental in eliminating from the field of public entertainment the views of people—particularly the youth of this country being moved to a large extent—people who decline to answer a question as to whether or not they are members of the Communist Party, it would make me extremely happy. [P. 1736, Sept. 21, 1951.]

* * *

Mr. Tavenner. But I am asking you now, with the knowledge that you have, would you knowingly put a person in charge of the administrative duties such as you had or, I might add, in the position that you now hold as a producer if they were a member of the Communist Party?

Mr. (Sidney) Buchman. Yes. Well, I would first consider certain professional competence, Mr. Tavenner.

Mr. Tavenner. Certain what?

Mr. Buchman. Professional competence. This would interest me first. After that, as to his views, this troubled subject of whether he is a subversive man and a dangerous man—

Mr. Tavenner. You would ask him?

Mr. Buchman. Or has committed an illegal act, I would wonder about it, but I think in view of public opinion and my feelings today, I would say, therefore, that I would not.

Mr. Tavenner. Thank you. That is all. [Pp. 1877-78, Sept. 25, 1951.]

* * *

Rep. Jackson. I have one more question. You have gone over the list of the friendly witnesses. What of the unfriendly witnesses? Do you have any knowledge of whether or not any material has been sold, or, conversely, has been purchased from those witnesses who have refused to cooperate and answer the questions of this committee?

Mr. (Carl) Tunberg. I have no direct knowledge of it, no. I heard of rumors that some members—some of the unfriendly 10 have written scripts under other names which have been purchased unwittingly by studios. I have no proof of that. [P. 1855, Sep. 25, 1951.]

* * *

Mr. Tavenner. How are you now employed?

Mr. (George) Glass. I am with the Stanley Kramer Co. I am in charge of advertising, exploitation, publicity, merchandising of motion pictures. We are a production company.

Mr. Tavenner. There was a witness who appeared before the committee by the name of Carl Foreman who was also an employee of that company; is that right?

Mr. Glass. Yes, sir.

Mr. Tavenner. He refused to testify?

Mr. Glass. Yes, sir.

Mr. Tavenner. With regard to most of the questions which were asked?

Mr. Glass. I recall him.

Mr. Tavenner. His connection with the firm was terminated promptly?

Mr. Glass. Totally inactive. He has no further connection with our firm. [P. 2495, Jan. 21, 1952.]

* * *

Rep. Wood. I am not going to let that statement go unchallenged. I know nothing about his economic conditions but if what he says here is true, it is not this committee that has cut his income off; it is him. We are giving you an opportunity now to restore it, if indeed you have lost it, by simply telling us the truth.

Dr. (Alexander E.) Pennes. By becoming an informer.

Rep. Wood. Well, if you want to put it that way, yes. [P. 4127, Oct. 3, 1952.]

* * *

Mr. (Herman) Waldman. For instance, I heard you say in what I assume is good faith, I heard you say, "We want these people to testify so they can go back to their jobs and their business" and would you guarantee that I have a job to go back to after I testify? Would you guarantee me that?

Rep. Doyle. I wish I could. I wish I could have your guaranty that you are not a member of the Communist Party. You could get some guaranty then. [Pp. 4212-3, Oct. 6, 1952.]

* * *

Rep. Jackson. Are you here in response to a subpoena?

Mr. (George) Bassman. No, sir; I came here because I felt that it was important for my work, which is in New York City, to have it on the record that whereas I may have at one time been a member of the Communist Party, I haven't been for over 12 years, that I am no longer

interested in it, and I wanted to take advantage of the fact that I knew this committee would give me this kind of a hearing. So to prospective employers in New York City, if the question were to come up, since I had been named, as to was I, or am I or am I not a member, I could truthfully state that I am not. [P. 2370, Jan. 28, 1952.]

* * *

Mr. Tavenner. Well, as shown from the transcript of the record, you denied before this committee that you had ever been a member of the Communist Party. Now, what do you desire to say about that?

Mr. (Danny) Dare. Well, I was in New York at that time with my family, employed, and the way the news was broken to me was quite a shock. I was called in by my employer and shown a newspaper article mentioning my name, as the testimony showed.

Well, I became panicky, and realizing that if I said, "Yes, this is true," I would immediately lose my job, which I particularly did not want to do at the time, not only from my financial standpoint but I was in the midst of doing an anti-Communist show called The Crusade for Freedom, which was a nationwide telecast, and I became emotionally panicky and I thought I could brazen it through, because actually I had been so little advised that I must did the wrong thing, did the stupid thing, through fear and panic. [P. 272, Mar. 23, 1953.]

* * *

Rep. Clardy. You have named a considerable number who you said were members of the party and active in pictures in one fashion or another. How many of those are still active in pictures today?

Mr. (David A.) Lang. There has been nobody named that has been an unfriendly witness or that has stood on

the fifth amendment that works in a motion-picture studio today, to my knowledge.

Rep. Clardy. So that you have named everybody removed from the scene, in one fashion or another?

Mr. Lang. I believe they have been. [P. 354, Mar. 24, 1953.]

* * *

Rep. Doyle. I feel as a member of this committee, I want to sincerely counter your charge that this committee is interested in blacklisting people. That is absolutely false. As a member of this committee, I want you to understand that I am not interested in anyone being blacklisted unless they are subversive and intend to unlawfully overthrow my Government. [P. 482, Mar. 26, 1953.]

* * *

Rep. Moulder. Since your return from the United States Army have you knowingly employed any member of the Communist Party in connection with your own work?

Mr. (Harold) Hecht. I have not. I have never employed a member of the Communist Party because he was a member of the Communist Party. I employed people purely and simply because I thought they were talented and the best suited to the work that I was looking for.

In December 1950 I made a flat policy with our company of not hiring any more Communists, investigating them and making sure that we did not hire any more communists, and since that time we have carried this out.

Before that—I want to say again—I never hired anyone because I knew he was a Communist, for that reason, but from that date we investigated and made specificially sure as to that. [P. 314, Mar. 23, 1953.]

* * *

Mr. (William M.) Alland. No, sir. I must say this on the record, that I have seen some members since I have withdrawn, and I must say I even hired Virginia Mullen

for a small part in a picture of mine, for 2 reasons—but I was sort of led to believe, I heard that she would, if she were called, be cooperative, and then she had 2 children and she was—how shall I put it—she appealed to my sympathy on that ground, that she needed the work. So I gave h . a day's work.

Rep. Doyle. How long ago, approximately?

Mr. Alland. I would say a year, a year and a half ago.

Rep. Doyle. You said you understood from her that she was cooperative with the committee?

Mr. Alland. I understood from her that if she were subpoened that she would be cooperative.

Rep. Doyle. Virginia Mullen?

Mr. Alland. She didn't even say this, but by inferences she led me to believe this, although, in all honesty, I have to say that she appealed to me on the basis of needing a job, and I, having known her and having known she had two kids, I did give her one. [P. 3528, Nov. 23, 1953.]

* * *

Mr. (Milton) Merlin. . . . . As a matter of fact, my purpose in bringing this up is that I would like to forestall what has been a question to me which has been to my personal concern to me and my profession, and as a citizen, that is the need to prove my innocence, and also have a time getting a job. You probably know about the confused situation in the television and radio industry, where even the mention of a name in connection with such means that you are lost and you don't know what to do about it. I ask the parties concerned to relieve other people of responsibility, but this means nothing to them.

So the reason I am down here is, one, personal, and the other is to be of any assistance I can be to you to help in some thing that I think is a thing that is needed and that will be of benefit in my success and additionally for

the guild. There is a personal reason for my being here, too. [P. 3552, Nov. 23, 1953.]

* * *

Mr. Kunzig (Committee Counsel). "I want to get your opinion on the rumor that since the exposé of Communist activity in the motion-picture industry, the residue of the Communist leftwing, and so forth, have secreted themselves in the legitimate stage in New York. Do you have any information about that?" [P. 7269. Questioning of Nicholas Bela, Dec. 14, 1954.]

B. Activities of the Committee With Respect to Control of Ideas and Censorship.

Mr. Tavenner (Committee Counsel). Well, now, what instances can you point out to the committee in which the Communists succeeded in influencing the content of the film?

Mr. (Harold) Ashe. As I said I didn't come prepared on this point. I would like to point out, however, that Blockade was written by Clifford Odets, I believe; and John Howard Lawson took the credit. Blockade was certainly a Communist film from start to finish. It used the situation in Spain; it is true, as the focal point for the film; but, if I had the time and had resources, I think I could trace Blockade right back to its original source; namely, one of the leading propagandists for the Soviet Union who had used the same film years and years and years before—used the same theme. The same theme was used at still a later date by a German producer who was a Communist, and in 1938, Mr. Lawson and Clifford Odets helped themselves to it again—gave it a different name a little different treatment. The theme was exactly the same.

Mr. Tavenner. Now do you think the success in being able to impart the Communist line into the film was the result of carelessness or any deliberate attempt on the part of the producers to permit such a thing—

Mr. Ashe. No.

Mr. Tavenner. Or was it a thing that you think was accomplished through stealth and deceit, or how do you explain it? . . . [P. 1436, Sept. 17, 1951.]

* * *

Rep. Doyle. * * * Now, let me say this, too: You are in a wonderful place, through your art, your music, your talent, which God blessed you with, to perhaps be very vigorous and positive in promoting Americanism in contrast to Communism. Let me suggest to you that you use that great talent which God has blessed you with to put into ballets in some way, to put into music in some way, that interpretation.

Mr. (Jerome) Robbins. Sir, all my works have been acclaimed for its American quality particularly.

Rep. Doyle. I realize that, but let me urge you to even put more of that in it where you can appropriately. [Pp. 1324-1325, May 5, 1953.]

* * *

Mr. (Max Nathan) Benoff. Well, I am glad and I appreciate and thank you for asking me that, because my name—and we have really gone over this—my recollection, by looking at lists—and everybody has a list today—and any place at all, you can't find my name on one organization, front, back, sideways, or anything; just nothing. I don't join. I am not a joiner. I am a stay-outer.

Rep. Clardy. Let's hope that continues. [P. 360, Mar. 24, 1953.]

* * *

3. Proceedings Before the Committee Relating to Petitioners.

A. References to Petitioners by Other Witnesses Before the Committee.

John Howland Chamberlin, page 838 (83rd Congress). [All references are to the Hearing of the Un-American Activities Committee for the respective Congress indicated.]

Howard da Silva, pages 142, 1602 (82nd Congress).

Guy Endore, pages 1580, 4275 (82nd Congress); pages 348, 944, 1480, 2339, 7265 (83rd Congress).

Donald A. Gordon, page 1582 (82nd Congress).

Fred Graff (None).

Alvin Hammer, page 4100 (82nd Congress); page 3518 (83rd Congress).

Edgar F. Huebsch, pages 636, 1517, 1579, 2309, 3531, 4252 (82nd Congress); page 349 (83rd Congress).

Paul Jarrico, pages 236, 286, 1513, 1597, 1686, 1726, 2073, 5378, 4094 (82nd Congress); pages 343, 359, 3523, 1494, 7253 (83rd Congress).

Robert Lees, pages 142, 1512, 1597, 1724, 3520, 4275 (82nd Congress); page 7523 (83rd Congress).

Albert Louis Levitt, page 1594 (82nd Congress); pages 930, 941, 350 (83rd Congress).

Paul Perlin, pages 2319, 4988, 3517 (83rd Congress).

Abraham Lincoln Polonsky, pages 141, 246, 288, 3533 (82nd Congress); pages 948, 4988 (83rd Congress).

Anne Revere, page 2303 (82nd Congress); page 2349 (83rd Congress).

Robert L. Richards, page 959, 4275 (82nd Congress).

Frederick I. Rinaldo, pages 1597, 1724 (82nd Congress); page 954, 1481, 7265 (83rd Congress).

Louise Rousseau, page 350, 4986 (83rd Congress).

Waldo Salt, pages 245, 286, 631, 1510, 1574 (82nd Congress); pages 930, 954, 967, 349, 1480, 2325, 7265 (83rd Congress).

Wilma Shore, pages 1594, 4276 (82nd Congress); page 350 (83rd Congress).

Louis Solomon, page 1594 (82nd Congress); pages 954, 340, 1477, 4986, 7265 (83rd Congress).

Gale Sondergaard, pages 1582, 1719 (82nd Congress); pages 311, 1349, 2303 (83rd Congress).

Philip Stevenson, page 4275 (82nd Congress); pages 944, 959 (83rd Congress).

Herta Uerkvitz, pages 1586, 1719 (82nd Congress); page 7265 (83rd Congress).

Michael Wilson, page 4252 (82nd Congress) pages 913, 929, 339, and 2338 (83rd Congress).

B. Nature of Activities Allegedly Engaged in by Petitioners.

Mr. Tavenner (Committee Counsel). The committee, in its study of the problem facing us in Hollywood, has been anxious to determine just what the purpose of the Communist Party was in its extreme efforts in organizing the party in this area. As a result of your experience and association with it can you tell the committee briefly what the aims and objectives of the Communist Party were in this area?

Mr. (Martin) Berkeley. Well, the aims, as I understood them from conferences, ... were the organization of a Screen Writers' Guild, which we needed very badly. The second objective was to get rid of Browne

and Bioff, the labor racketeers who were then the heads of the IATSE, who later served jail terms. Building an organization of extras, because, as I said before, they constituted the main body of actors. The formation of a Directors' Guild. . . . .

Another task was to build a labor daily out here. They had the Western Worker, which was a very sectarian newspaper. To supply aid to Spain. To expand the Hollywood Anti-Nazi League into a national organization, which would have been done except for the Hitler-Stalin pact, and also the formation of a left-wing Democratic Party organization in Hollywood which flowered at a later date as the Motion Picture Democratic Committee. [P. 1584, Sept. 19, 1951.]

* * *

Mr. Tavenner. I would like you tell us a little more about the character of the work of the Communist Party through the fractions dealing with the minority groups which you are now discussing.

Mr. Berkeley. Well, it took various forms. There was the problem of the minority group in the picture, in the film, itself; in the story you were working on. In the past many minority groups were degraded, both in the theater and in pictures, and a great deal of time and study went into the problem of how to treat the minority group in pictures. The problem of a Jew, how he should be made up, how he should speak; the manner of the Negro, and quite correct so; other work that was done—you see, things like the Scottsboro boys, they came under this particular group. . . .

Mr. Tavenner. Very well. There is an organization in Hollywood known as the Hollywood Theatre Alliance?

Mr. Berkeley. There was such an organization; yes, sir.

Mr. Tavenner. Did you come in contact with the work of that organization.

Mr. Berkeley. Yes. I worked—I attended a few meetings of the fraction of that organization around 1938 or 1939.

* * *

Mr. Tavenner. Did you know the circumstances under which it was organized?

Mr. Berkeley. The Hollywood Theatre Alliance was organized directly by the Communist Party for the purpose of presenting so-called progressive or left-wing or anti-Fascist propaganda.

I believe their first production, which was the one I couldn't think of before in relation to Mr. Bassman, was Meet the People, which was very successful both here and in New York. . . . [P. 1600, Sept. 19, 1951.]

* * *

Mr. Wheeler. And during this period of time were you also a member of the second group for the Communist Party? This was extra-curricular work, was it not?

Mrs. (Babette) Lang. Yes. This was my assignment, and also during that time I had another assignment which was to organize a blood donor's booth, which I did, and carried on that for many, many months. We had a blood Booth on Wilshire Boulevard, and we all took turns taking hours there in recruiting blood donors. So it all seemed a very worthwhile furthering of the war effort.

Mr. Wheeler. Who were the lecturers at these discussions?

Mrs. Lang. Actually, there were no lecturers. It was just as I said. The group would decide what they wanted to talk about, and then some person would just say. "Well, I'll look up and get some material on that subject," if it was the Negro question or the Jewish question or the Hitler-Stalin pact or whatever it was currently being talked about and thought about in the world. No one actually what you would call held the floor or gave any lectures. [Pp. 2340-2341, June 2, 1953.]

* * *

"The meetings consisted mainly, if you will remember the time, consisted mainly of discussions of—we were in a war then—discussions of how the war was going, current events, problems of actors in their work. It was more of a social, really a social occasion than a stereotyped kind of meeting." [P. 87, Testimony of Larry Parks, Mar. 21, 1951.]

* * *

"These meetings are, as a rule, fairly long and not terribly interesting. And they, you know, are very mild in terms of content. They would discuss day-to-day questions, you know, whatever those happened to be, the political questions of the day." [P. 243, testimony of Richard Collins, Apr. 12, 1951.]

* * *

". . . there was a good deal of propaganda within that Hollywood group about the time I was there, to get all of the members to write proletarian novels, and this seemed to be the line. They took no political stands on anything in the Hollywood group, and the other groups that I belonged to during the war were just interested in selling war bonds and stuff like that. The Hollywood group was interested only in Hollywood, and they never,

as far as I know, had a discussion of world politics. [P. 4274, testimony of Roy Huggins, Sept. 29, 1952.]

* * *

"The overall purpose was simply that these people were Communists and they met to discuss what was going on. In a meeting the discussion would usually be split up into what was going on in the industry that concerned them, and then part of the meeting would be devoted to the world situation, theoretical diagnoses, and so forth. [P. 141, testimony of Sterling Hayden, Apr. 10, 1951.]

* * *

Rep. Doyle. Did you ever receive any literature from Tompkins or anyone else which, in printed form, made any declaration or stated any policy or objective that caused you to conclude that the Communist Party, of which you later became a member, was interested in revolution against the American form of government?

Mr. Hayden. As I recall, it was always couched in other terms. I think a more perceptive person would have seen it. I did not at the time.

Rep. Doyle. You believe the literature you received from Tompkins did advocate the overthrow of the American form of government?

Mr. Hayden. I think that was the ultimate objective; yes.

Rep. Doyle. Do you have any of that literature now?

Mr. Hayden. No.

Rep. Doyle. Do you know where any of it could be had?

Mr. Hayden. No. I know it used to be out in plain sight in some of the book stores. [P. 152, Apr. 10, 1951.]

* * *

C. Record of Petitioners' Employment in the Industry.

John Howland Chamberlin. "I have been engaged as a professional actor in Hollywood and its environs since 1936." [P. 1506.]

* * * "Since there are over a hundred plays that I have participated in as an actor, I find it rather difficult to single out any one of them. * * * The first motion picture that I played in as an actor was 'The Best Years of Our Lives,' which I am very proud to have been associated with, and I wish to make the comment that one of the creative artists involved in the making of this picture said not too long ago that 'Due to the atmosphere of the country at the present, I would be unable to make such a picture today.' I charge that this Committee is responsible in helping create this kind of an atmosphere which creates censorship. * * * There have been some twenty motion pictures which I have participated in. The present one that is showing in the motion picture houses of the country is 'Pick Up.' There have been a number of television pictures that I have performed in as well." [P. 1507, Sept. 18, 1951.]

Howard da Silva. "From 1929 to 1938 I served as an actor on Broadway * * * I think the first time (in motion pictures was) in 1939, when I appeared in 'Abe Lincoln in Illinois.'" [P. 115, Mar. 21, 1951.]

Donald A. Gordon. "I am an assistant in the story department at Metro Goldwyn Mayer * * * (Prior to that time), I was head of the reading department at Paramount for six years." [Pp. 1786-1787, Sept. 24, 1951.]

Fred Graff. (I am) a semi-employed free lance actor. * * * I found myself with a contract with Columbia

Pictures in 1944 (February). * * * I remained under contract for the remainder of the year, at which time I was called to serve my country. * * * (After my discharge) I had found six weeks remaining on my contract, and I filled them out at Columbia.", [P. 299, Apr. 13, 1951.]

Alvin Hammer. "(as a night club entertainer in New York, I was employed at the) Village Vanguard * * * Cafe Society, Rainbow Room, (I was employed at Cafe Society) about eighteen months * * * sometime in 1941. [P. 453.] * * * I played in about thirty pictures * * * 'Mother Wore Tights,' * * * 'Fabulous Susan.'" [P. 456, May 16, 1951.]

Edward F. Huebsch. "I became a screen writer ten days after my discharge from the Army in 1946." [P. 374, Mar. 23, 1953.]

Paul Jarrico. "Until two weeks ago I was a screen writer. * * * I was employed at RKO Radio Pictures until the day I received a subpoena from this Committee." [P. 275, April 13, 1951.]

Robert Lees. "I started acting in an extra capacity, bit capacity, for the years 1930 and 1934. Starting in 1934 I became a writer at Metro Goldwyn Mayer, where I did some fifty-five, roughly, short films—Robert Benchley, Pete Smith, Crime Doesn't Pay. Quite a few shorts, two of which won Academy Awards at the time. Then I started writing features and they were primarily comedies. There was one 'No Time for Love' with Fred MacMurray, Claudette Colbert * * * About 1942 * * * I worked at Universal International and did quite a few films for them, mostly Abbott and Costello

comedies; I think about five or six of them. 'Hold That Ghost,' 'Meet Frankenstein,' * * * 'Meet the Invisible Man,' 'Widow of Wagon's Gap' * * * the last employment I had was at Republic Studios where I was employed to write a picture for Judy Canova * * * I would think about a week or two before I received my subpoena, and I remember attributing the fact that I was suddenly let go to the fact that maybe my appearance before this Committee was responsible * * * My last employment prior to that at Universal International Studios where I was working on a picture for Jimmy Durante and Donald O'Conner * * * The last production was 'The Real McCoy' for Abbott and Costello, which hasn't been released and the one before that which is now playing the theatres is 'Meet the Invisible Man' * * *. This was approximately in 1950.)" [Pp. 194, 195, Apr. 11, 1951.]

Albert Lewis Levitt. "I came out here in about 1939, and my employment background, generally, has included work as a reader in the studios, until the time I entered the Army, and upon my return from overseas I worked as a freelance writer at various studios [p. 1552]. * * * My name appears on a film called 'The Boy With Green Hair'; a script called 'The Wild Country,' which is not yet produced and a film called 'Shakedown'; on a film called 'Mrs. Mike'; and a script which is now in preparation called 'Dream Wife.'" [P. 1558, Sept. 18, 1951.]

Paul Perlin. "Since 1935 I worked in the film industry * * until the time that I volunteered for service in the armed forces. * * * My main place of employment was Universal Pictures where I worked a number of years. * * * (Upon return from service) I was again

employed in the motion picture industry up until the time I was blacklisted on June 15." [Pp. 4228, 4229, Oct. 6, 1952.]

Abraham Lincoln Polonsky. "I started work in the radio business toward the end of 1936, and I worked in radio until toward the end of 1943, and I also wrote several books in that time and stories and serials for the magazines. After that, beginning in 1945 I began to work in motion pictures, and I have worked there since with the exception of some stories that I wrote for magazines and a novel recently published by Little, Brown & Company. * * * I got a screen credit on a picture in which Marlene Dietrich appeared called 'Golden Earrings.' I wrote the screen play 'Body and Soul,' and collaborated in writing the play 'Force of Evil,' and was the sole author of the screen play, 'I Can Get It For You Wholesale' * * * I was employed at Twentieth Century Fox until this business started, and then I was released." [Pp. 396, 397, Apr. 25, 1951.]

* * *

Anne Revere. "I began in the theatre (as an actress) many years ago. I presume that my most successful plays were 'Double Door' and 'The Children's Hour' in which I had an extended engagement. I also established or helped to establish a theatre, which I owned and operated, in Surrey, Maine. Subsequently, in 1934, I first came to Hollywood to do the picture version of 'Double Door,' then went back to New York. For approximately eleven years, I would say, I've been a resident of California, and during a great portion of that time, employed in the studios." [P. 319, Apr. 17, 1951.]

Robert L. Richards. "I worked for Time, Inc. for about seven years. I was a writer for and subsequently

a producer of the March of Time radio program. I was an associate producer of the March of Time on the Screen. * * * I came out to Hollywood about the end of 1942, did some radio, joined the merchant marine, subsequently went into motion pictures. I have been employed for about * * * about four years quite steadily, writing screen plays in the motion picture industry. * * * [P. 1641] * * * My first screen credit was a picture called 'One Sunday Afternoon' for Warner Brothers. It was a musical. My next screen credit was a picture called 'Act of Violence' for Metro Goldwyn Mayer. * * * My next screen credit for Universal International was a picture called 'Johnny Stoolpigeon.' My (next) credit was * * * 'Winchester 73' * * * There was a picture called 'Air Cadet,' 'Kansas Riders'." [P. 1643, Sept. 20, 1951.]

Louise Rousseau. "Since 1943 * * * I write Westerns as a whole. * * * I have written for Jimmy Wakeley, Monte Hale, The Durango Kid, the Lone Ranger and the Cisco Kid." [P. 1740, Sept. 21, 1951.]

Waldo Salt. "I began as a junior writer, I believe I was twenty years old, at Metro Goldwyn Mayer; worked there for five years * * * I think it began in 1936 and ran through to 1941 * * * I had credit on 'Shop Worn Angel,' * * * 'Wild Man of Borneo' * * * 'Tonight We Raid Calais' for Twentieth Century Fox 'Mr. Winkle Goes to War' for Columbia, 'Rachel and the Stranger' for RKO * * * 'The Flame and the Arrow' for Warner Brothers." [P. 260.]

Rep. Jackson. * * * Mr. Salt, you are employed by Norma Productions; is that my understanding?

Mr. Salt. No. That was terminated as soon as my subpoena was made public.

Rep. Jackson. Who is the head of Norma Productions?

Mr. Salt. Norma Productions is an independent company, I believe, made up of Harold Hecht and Burt Lancaster.

Rep. Jackson. When was your last employment at R-K-O, Mr. Salt?

Mr. Salt. It was just before I went to work on this. I would say that it was 3 or 4 months. I am not exactly sure of the date. I was rushing to finish one screen play to move over to another.

Rep. Jackson. Was that in 1950?

Mr. Salt. I think it probably was; yes.

Rep. Jackson. What script were you engaged on at R-K-O?

Mr. Salt. I finished the screen play of 'The Day They Gave the Babies Away.'

Rep. Jackson. Who hired you at R-K-O?

Mr. Salt. Eddie Granger. [P. 272, Apr. 13, 1951.]

Gail Sondergaard. "I began (as an actress) on a touring Shakespearean Company. * * * I worked with Jessie Bonstelle in Detroit for two years as her second and then her leading lady. I worked with the Theatre Guild for a number of years * * * in many Broadway plays. I went to Hollywood and I have been there for the past six years. * * * [P. 122, Mar. 21, 1951.] Won an Oscar for her performance in 'Anthony Adverse' and nominated for another for 'Anna and the King of Siam.'" [P. 5391, July 17, 1956.]

Philip Edward Stevenson. "(I began) as a screen writer in 1944 * * * I received credit on my first picture which was the Ernie Pyle 'Story of G. I. Joe.'" [Pp. 1614-1615, Sept. 19, 1951.]

Herta Uerkvitz. "I have been in the motion picture industry steadily since 1922, and in this particular architectural field, specifically in charge of a department since 1936 * * * I have been at Metro Goldwyn Mayer since 1929. Previous to that I was in several other large studios." [P. 1700, Sept. 20, 1951.]

Michael Wilson. "I am a writer and I intend to continue being a writer despite any attempt to blacklist me."

* * *

Rep. Wood (Chairman). Just a moment. If by that statement you seek to leave an inference that anyone here is seeking to blacklist you, I want to take exception to it at this point and remind you, sir, that as far as the activities of this Committee are concerned there is no attempt to blacklist anybody.

Mr. Wilson. Well, it seems to me, Mr. Wood, that in view of the fact that three days after I announced to my employer that I had a subpoena from your Committee, despite the fact that I had been accused of nothing, I was taken off the payroll.

Rep. Wood. Under those circumstances, sir, I hope by your testimony here you will convince your employer that your removal from the payroll was without justification and we are giving you the opportunity to do just that on the best forum that I know of.

* * *

My first credit was a picture called 'The Men in Her Life' * * * about 1940. I then did a number of Hopalong Cassidy pictures * * * I then entered the service of my country and after the war, three years later I was again employed. I contributed to a picture called 'It's a Wonderful Life,' 'A Place in the Sun,' based on

Mr. Theodore Dreiser's 'An American Tragedy,' * * * 'Five Fingers' * * * a screen play * * * on Thomas Wolfe's novel, 'Look Homeward Angel,' and a second called 'The Friendly Persuasion,' which was about the Quaker people. I might add, Mr. Tavenner, that I feel this Committee might take the credit, or a part of it at least, for the fact that 'The Friendly Persuasion' was not produced, in view of the fact, that it dealt warmly, in my opinion, with a peace-loving people. [Pp. 1674, 1676, Sept. 20, 1951.]

D. The Committee's Program of Blacklisting Petitioners and Their Objections Thereto.

John Howland Chamberlin. My present occupation is an actor, and I find it deeply repugnant and profoundly un-American to be smeared, blacklisted, and strangled economically by my presence before this Committee.

Rep. Wood (Chairman). Mr. Chamberlain, your presence before this Committee is the best forum that I knaow of for you to relieve your self of any smear or blacklist. [P. 1506.]

* * *

Mr. Tavenner. Who employed you in connection with those two pictures ('The Best Years of Our Lives' and 'Pick Up')?

Mr. Chamberlin. The procedure of employment in the motion picture industry is through the actor's agent, together with the studio or the producing company which is responsible for that particular picture.

Mr. Tavenner. Who was your agent in those two instances?

Mr. Chamberlin. Bender & Ward Agency.

Mr. Tavenner. In both instances?

Mr. Chamberlin. Yes, in both instances.

Mr. Tavenner. Was any inquiry made of you regarding your Communist Party or alleged Communist Party affiliations prior to your employment in those pictures? [P. 1507, Sept. 18, 1951 Hearings, 82nd Congress.]

Howard da Silva.

Counsel for da Silva and Gale Sondergaard sent a telegraphic motion to quash their subpoenas on March 20, 1951, stating:

"This motion will be made upon the grounds that our clients have not been subpoenaed merely as witnesses but rather they occupy the position of defendants charged with political heresy in a proceeding which can result in deprivation of their livelihoods." [P. 112.]

* * *

"I refuse to answer the question (whether he was a vice-president of the Civil Rights Congress) on the following basis: The First and Fifth Amendments and all of the Bill of Rights protect me from any inquisitorial procedure, and I may not be compelled to cooperate with this Committee in producing evidence designed to incriminate me and to drive me from my profession as an actor." [P. 115, Mar. 21, 1951.]

Paul Jarrico.

Mr. Tavenner. By what company were you employed?

Mr. Jarrico. RKO Radio Pictures.

Mr. Tavenner. Who employed you?

Mr. Jarrico. I was employed by the studio.

Mr. Tavenner. The studio must have had an official representative, of course in making the employment. Who was he?

Mr. Jarrico. Well, my immediate producer was Mr. Robert Sparks. However, I must protest at this point.

It seems to me an attempt to create the basis for a blacklist in Hollywood, on the basis of guilt by employment, guilt by the mere fact that you employ a man. Mr. Sparks, a conservative gentleman, I am sure, employed me because he thought I was the best man to do that particular job, and not because of my politics. [P. 275.]

Rep. Wood (Chairman). * * * No man has ever come before this Committee yet and answered truthfully and frankly the questions that have been put to him who has ever, to my knowledge, been injured thereby. If people are being deprived of any rights or privileges of employment because of their appearance before this Committee, it has been because of matters that they themselves have brought about, and not this Committee. If being a member of a subversive organization and admitting such causes a man to lose some employment rights, that is his responsibility and not this Committee's. If he declines to answer whether he has or not and thereby loses his employment rights, that likewise is his responsibility and not this Committee's. This Committee has never yet been responsible for any man being a member of any organization, subversive or otherwise." [Pp. 281, 282, April 13, 1951.]

Robert Lees.

Mr. Tavenner. In any of the instances in which you were not employed, were you questioned about your affiliations with the Communist Party or any Communist Party organizations? * * *

Mr. Lees. * * * There has been no question of any political affiliations in the terms of my employment that I have discussed or even been asked to discuss by any of the people I have worked for. Even up to the very last time I was hired. The general concept seemed

to be that a man was hired on his ability as a writer and not on any kind of political affiliations he might have, and simply as to whether he could do the job or not do the job. [Pp. 197, 198.]

Mr. Tavenner. Has the Screen Writers Guild to your knowledge made an effort to remove not from membership but to curtail the activities of persons thought to be members of the Communist Party within this group? * * *

Mr. Lees. Not that I know of. I might say that there is a statement of policy in the Screen Writers Guild which says that anyone can be a member of the Screen Writers Guild without any ban because of race, creed, religion, political beliefs, something similar to the First Amendment. Nobody is required to be anything but a writer to joint the Screen Writers Guild. [P. 206.]

Gale Sondergaard.

Mr. Arens (Committee Counsel). I invite your attention to a report which was published very recently on so-called "blacklisting" by the Fund for the Republic, in which are set forth a series of some few cases alleged by the author to be typical of people who have been denied employment or have been impeded in their employment. I should like to read you one particular paragraph which is applicable to yourself.

"Gale Sondergaard, wife of Herbert Biberman of the Hollywood Ten, found that she was suddenly 'unemployable' after her husband refused to testify, though she had previously made about 45 pictures, had won an Oscar for her performance in 'Anthony Adverse' and had been nominated for another after she appeared in 'Anna and the King of Siam.' Following the 1947 hearings Miss

Sondergaard made only one film, produced by Mervyn LeRoy. LeRoy told her that he had been questioned by dozens of people who asked him wonderingly if he did not know who she was."

On the basis of this report which is published by a great foundation with tremendous resources and being disseminated over the length and breadth of this land, I should like to ask you if it is a fact that following your husband's appearance your actual activity in the theatrical world was minimized. Is that correct?

Miss Sondergaard. I would say it very definitely is correct in the motion picture industry.

Mr. Arens. In your judgment was that attributed exclusively to the fact, as recounted here, that your husband had refused to testify in a proceeding?

Miss Sondergaard. It would be my opinion that this was the reason I was not employed.

Rep. Scherer. What year was that, Mr. Counsel?

Mr. Arens. In 1947. Have you ever been discriminated against in employment in the theater because of your political beliefs?

Miss Sondergaard. Not to my knowledge.

Mr. Arens. Have you ever been discriminated against in the theater because you were a controversial figure?

Miss Sondergaard. Not to my mind.

Mr. Arens. In your judgment, following 1947 did any incident occur in your life which contributed to a lessening in your employment in the theater?

Miss Sondergaard. Yes, of course.

Mr. Arens. Kindly recount it just in your own words.

Miss Sondergaard. The fact that I was called before this committee and invoked the fifth amendment at that time.

Mr. Arens. In your opinion is that the exclusive and sole reason why you have had a lessening in your employment since 1947?

Miss Sondergaard. In my opinion, yes. [Pp. 5391, 5392, July 17, 1956.]

* * *

Mr. Arens. Do you regard it as blacklisting for the entertainment industry to preclude employment opportunity to people who have been identified under oath by responsible witnesses before a congressional committee as members of the Communist conspiracy? [P. 5398, July 17, 1956.]

E. The Bases for Petitioners' Refusals to Answer Questions Other Than the Fifth Amendment.

Howland Chamberlin.

Mr. Tavenner. * * * The Committee is in possession of information that you registered as a member of the Communist Party for the 1938 election, and I would like to give you an opportunity to explain that. * * *

Mr. Chamberlin. It is my opinion that this Committee is invading the rights of a person's personal political views, and, therefore, I must point out in my answer to this question that it neither confirms nor denies guilt in this question, and I invoke my right and my privilege in order not to testify against myself to the use of the Fifth Amendment. * * *

Rep. Potter. From your testimony, I assume that it is your contention that the Communist Party is a politi-

cal party rather than an international conspiracy; do you care to comment on that assumption I have from your testimony?

Mr. Chamberlin. I cannot help the assumption of the congressmen of this Committee taken regarding to any statement that I may make. I would be very happy to express my personal beliefs if there was not an atmosphere of repression and a feeling of persecution and, therefore, I must stand on the grounds similarly stated. [P. 1508, Sept. 18, 1951.]

Howard da Silva.

"At this point may I object to being called to testify against myself in this hearing. I object because the First and Fifth Amendments and all the Bill of Rights protect me from any inquisitorial procedure, and I may not be compelled to cooperate with this Committee in producing evidence designed to incriminate me and to drive me from my profession as an actor." [P. 114, March 21, 1951.]

Paul Jarrico.

"I feel I am defending the Constitution, sir, and not hiding behind it. I feel that sincerely. I feel that if you were sincere in your declarations against blacklisting that you would make it plain that the people who claim their constitutional privileges should not be discriminated against in Hollywood, because Hollywood has the impression that you intend everyone who is called before this Committee and who does not cooperate with this Committee to be driven from the industry." [P. 281, April 13, 1951.]

Edward F. Huebsch.

"This question goes to the issue of my right to attend meetings and * * * I cannot answer that because Congress cannot tell me what meetings I should go to and which I should not go to. That is the question of the First Amendment." [P. 374, March 25, 1953.]

Robert Lees.

"I am claiming the right not to answer that question on the grounds of the First Amendment, which I believe guarantees freedom of belief and expression, and the Fifth Amendment which says that a man is not required to testify against himself." [Pp. 198, 199.]

* * *

Mr. Lees. * * * I feel that this certainly comes under the heading of some kind of pressure that can be termed "blacklist", if you will and that I don't feel that a blacklist denying people employment for whatever political beliefs they might hold is American.

Rep. Doyle. Not even if those people directly or indirectly are interested in using force and violence to upset the constitutional form of government in this country as testified to yesterday by your fellow actor Hayden?

Mr. Lees. I said this—I have to make myself very clear about this. I said that anyone who uses force or violence should be treated by the proper authorities.

Rep. Doyle. All right.

Mr. Lees. I also stated that matters of opinion are sacred under our First Amendment, and when you go into the area of thought—and, believe me, I as a writer make my living in the area of thought—in the matter of research, in the matter of reading, in the matter of all these things, I feel that any infringement on perhaps opinions or thoughts which this Committee or some

future committee might deem suddenly un-American becomes a very dangerous thing in this country. * * *

Rep. Doyle. Then do I understand that a courteous answer to me, and I appreciate your courteous answer—do I understand that you feel that if members of the Communist Party, * * * just talk about overthrowing the United States of America by force, is that O.K. so long as they don't take any action to do it? [Pp. 214, 215, March 11, 1951.]

Alfred Levitt.

Rep. Potter. Of course, you realize, as well as I, that the suppression of opinion in a Communist-dominated country, and within the Communist Party itself, is much more severe than any suppression of opinion that you would ever get or ever find in a democracy such as we have here.

Mr. Levitt. What I realize mostly is that this is my country, to which I give my allegiance and this is the country whose imperfections, when they exist, I wish to do everything I can to right, according to how I see it. I feel that any attempt to prevent me from doing so by blacklist, by official censure, or anything else tends to prevent the free exchange of ideas upon which this country is based. [Pp. 1557, 1558, Sept. 18, 1951.]

Paul Perlin.

"I further decline to answer on the grounds contained in public law 601, which, as I understand it, is supposed to commission the Committee to investigate in areas of subversive propaganda activities and to decide on remedial legislation. This public law 601, I contend, by the very nature of its language, is operating in the sphere of ideas, of opinions, of associations, and it is operating in

the very area of which the First Amendment grants to the American people. * * *

I further decline on the grounds contained in the First Amendment, which states to the best of my knowledge, that Congress shall pass no law abridging freedom of speech, press, or association, and by no law I understand it to mean no law. Maybe I am very naive but that is the way I understood it." [Pp. 4230, 4231, Oct. 6, 1952.]

Abraham Lincoln Polonsky.

"I am going to refuse to answer that question, sir, and claim the protection of the Fifth Amendment, the right against self incrimination, the right not to testify against myself, and so far as the First Amendment is relevant to it, I would like to use that too." [P. 397, April 25, 1951.]

Robert L. Richards.

"I may have opinions, some of which may be unpopular, unorthodox, or even totally erroneous. I must strongly maintain, sir, my right to hold these opinions and I further believe that it is a sacred duty of everyone in this room to maintain my right to hold those opinions." [P. 1646, Sept. 20, 1951.]

Philip Edward Stevenson.

"* * * I am going to claim my privileges under the First and Fifth Amendments of the Constitution in connection with such questions, and I hope I may observe that repeatedly the attempt has been made here to say that men are hiding behind these valuable protections to the individual. I want to make it perfectly clear that I am not hiding behind anything; that the Bill of Rights was designed, according to my research, to protect the individual from heresy hunting in the government." [P. 1615, Sept. 19, 1951.]

F. Questions Other Than Those Dealing With Communist Party Membership Put to Petitioners Which They Refused to Answer.

Howard da Silva.

"Have you ever held the position of vice president of * * * the New York Chapter of the Civil Rights Congress?" [P. 114.]

"Did you become affiliated with the Joint Anti-Fascist Refugee Committee?"

"Have you been affiliated with the Actors Laboratory in Hollywood?" [P. 116.]

* * *

"Did you sign a statement * * * which defended the twelve Communist Party leaders who were convicted of conspiracy to overthrow the government of the United States by force and violence?" [P. 117.]

"Did you take part in that celebration (of the 75th birthday of Mother Bloor)?" [P. 120, March 21, 1951.]

Donald A. Gordon.

"Would you mind stating to the Committee the circumstances under which you made those contributions to the New Masses (particularly a poem which appeared on April 9, 1939), if you did so?" [P. 1788.]

"Were you a financial supporter of the New Masses?" [P. 1789.]

"Were you at any time a member of the American Russian Institute?" [P. 1789, Sept. 24, 1951.]

Alvin Hammer.

"The Daily Worker of February 19, 1938, page 2, announced that members of the Young Communist League had denounced Japan and called for a boycott of its goods in a demonstration before the Japanese Consulate

at 500 Fifth Avenue, New York City on the previous day, February 18, and the newspaper stated that in addition to pickets carrying the signs, Al Hammer of 13 West 17th Street, played the role of Emperor Hirohito, dressed in coolie clothes and pulling a ricksha with Death as the passenger. Do you recall that? [P. 454.]

"I have an excerpt from the Daily People's World of March 26, 1948, the heading of which is 'High Time Skits', and this article which I am going to hand you refers to a number of skits to be introduced in the Embassy Auditorium under the sponsorship of the Civil Rights Congress. Included among the sponsors appears the name Al Hammer. I would like you to look at that and state whether Al Hammer is the same person as Alvin Hammer." [P. 454, May 16, 1951.]

Robert Lees.

"Have you ever consulted or collaborated in any of your work with an individual by the name of Fred I. Rinaldo?" [P. 201.]

"Are you a subscriber to the Daily People's World, the Worker, and The Daily Worker, or any of them?" [P. 202.]

"Have you made any contributions to * * * The American Youth for Democracy?" [P. 202.]

"Have you made contributions to the People's Educational Center?" [P. 202.]

"Were you a delegate to the State Conference on Civil Rights held in San Francisco on August 27 and 28, 1941 * * *? [P. 203.]

"Were you a member of the Joint Anti-Fascist Refugee Committee?" [P. 204.]

"Did you write a script on the subject of atomic energy for the Atomic Energy Commission of the Hollywood Writers Mobilization which was intended for a trans-continental radio program?" [P. 205.]

"Are you a member of the Actors Laboratory Theater?" [P. 205, April 11, 1951.]

Abraham Lincoln Polonsky.

"Were you an official of Actor's Laboratory? [P. 397.]

"Did you become one of the thirteen incorporators of the Hollywood Community Radio Group? [P. 398.]

"I have read that testimony to you (testimony given by Polonsky at a Federal Communications Commission hearing December 19, 1956 on the licensing of a station to the Hollywood Community Radio Group) and I am now going to ask you a question based on that testimony. Did those views as appear on the record of the hearing, of the propriety of the use of the radio station by Communists, apply equally to the use of the moving picture industry in connection with Communist activities? [P. 399.]

* * *

"Were you affiliated with the Council of Arts, Sciences and Professions as a member of its steering committee in 1950?" [P. 401, April 25, 1951.]

Anne Revere.

"While in Hollywood were your a member of Actor's Laboratory, Inc. or affiliated with it in any way?" [P. 319, April 17, 1951.]

Robert L. Richards.

"There appeared an article in the September 14, 1942 issue of the Daily Worker to the effect that the League

of American Writers was sponsoring the immediate opening of a second front, and I hand you the article in question. It appears from this article that your name was endorsed to this plan as sponsored by the League of American Writers. I am interested only to the extent of your participating in it as a member of the League of American Writers.",

* * *

"According to the November 3, 1947 issue of the Hollywood Reporter, there appears an advertisement contributed by the Actors' Division of the Progressive Citizens of America. * * * Now this advertisement proclaims that the Thomas-Rankin committee must go. Now, I raise no objection to anyone criticizing this committee or its predecessor, but we are anxious to know the extent to which the Communist Party imposes its thought, if any, upon other organizations in opposing the work of this committee or its predecessor, so after having looked at the article will you identify it as an advertisement in which you participated as one of the signers." [P. 1642, Sept. 20, 1951.]

Waldo Salt.

"Do you remember the Faculty School for Writers in Hollywood * * * conducted under the auspices of the League of American Writers?" [P. 261.]

"Were you at any time a member of the Board of Directors or other governing body of Actor's Laboratory, Inc.?"

* * *

"Did you make an announcement in the Daily People's World on January 20, 1944 supporting the formation of a group in Los Angeles to work for the release of Morris U. Schappes?"

* * *

"Were you a candidate for the executive board of the Hollywood Arts, Sciences and Professions Council of the Progressive Citizens of America in 1947?"

"Were you a sponsor of the state-wide conference on civil rights which was held in San Francisco, September 27-28, 1941?"

* * *

"Did you testify under oath at that time and before that committee (the State Committee on un-American Activities) in 1944 that you were a member of the Hollywood Democratic Committee?" [P. 262.]

"Were you affiliated with the Agricultural Aid Committee of the United Cannery, Packing and Allied Workers of America of which committee you were alleged to be chairman?"

* * *

"Mr. Salt, the cultural and scientific conference for world peace was held in New York City from March 25, to March 27, 1949 and this conference was attended by delegates from foreign countries as well as from this country. Did you endeavor to establish a comparable conference to be held in California * * * at which you planned that many of these foreign delegates would appear as speakers in the cultural and scientific conference which you desired to hold there, that is, 'Conference for Peace' so-called?" [P. 264, April 13, 1951.]

Gale Sondergaard.

"Are you familiar with an organization called the National Council of American Soviet Friendship?"

* * *

"You are familiar, I assume with an organization called the Motion Picture Artists Committee?"

* * *

"Have you been a sponsor at any time of the League of Women Shoppers?" [P. 123.]

"Miss Sondergaard, the records of the Committee disclose that you served as a sponsor of the Cultural and Scientific Congress for World Peace which was held at the Waldorf Astoria Hotel in New York City, March 25 to March 27, 1949 under the auspices of the National Council of Arts, Sciences and Professions. Is that correct?"

* * *

"The Daily Worker of June 23, 1950 states that you were scheduled to speak at the rally on June 28, 1950 in Madison Square Garden under the auspices of the Civil Rights Congress. On June 29, 1950, the newspaper stated that rally was staged in behalf of the eleven national Communist Party leaders who have been convicted of conspiracy to advocate the overthrow of the government by force and violence * * * Other speakers on the program * * * were identified as Gus Hall * * * Ben Gold, Paul Robeson, Vito Marcantonio, Ring Lardner, Jr. * * * I would like you to tell us all you know about the selection of the speakers on that occasion and your participation in the program, if you will?" [P. 124, March 21, 1951.]

Philip Edward Stevenson.

"Did you attend a meeting of that group, the Radio Committee of the Hollywood Writers Mobilization which discussed the plans of that body?" [P. 1616.]

"Have you at any time been a member of the Executive Board of the League of American Writers?"

* * *

"I would like to ask you if you participated in a meeting of an organization generally referred to as the

Thought Control Conference. It was a conference which was held on July 7, 1947, and was sponsored by the Hollywood Arts, Sciences and Professions Council of the Progressive Citizens of America * * * which called for the ending of the loyalty directive of President Truman and demanding that the House Committee on Un-American Activities be done away with as having no constitutional basis and also as to whether or not there was a resolution adopted at this conference calling for the freeing of Gerhart Eisler, Carl Marzani and the 16 defendants connected with the Joint Anti-Fascist Committee?" [P. 1617.]

* * *

"I show you a photostatic copy of pages 20 to 21 of June 1943 issue of Soviet Russia Today. These pages contain an open letter to the American people wherein the National Council of American Soviet Friendship calls on all Americans concerned with preserving United Nations unity to fight the menacing campaign against our Soviet ally. Among the names appearing as signers to this letter are Philip and Janet Stevenson. Will you examine the article referred to and state whether or not you were a signer of that letter sponsored by the National Council of American Soviet Friendship?" [P. 1618.]

* * *

"Were you a member of the Committee of 1,000?" [P. 1620, Sept. 19, 1951.]

LIBRARY

[redacted]

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

October Term, 1957

No. 33.

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

REPLY BRIEF FOR PETITIONERS.

I.

Respondents' Continued Insistence That Complaint Herein Seeks Judicial Relief for Interference With Contract Relations Rather Than for Abrogation of the Right to Work Permeates and Undermines All of Their Contentions.

Respondents' arguments are essentially the same as those which they advanced in opposition to the petition for the writ of certiorari. Virtually their entire argument is directed to the propriety of the grant of certiorari and the jurisdiction of this Court. The substantive issues are either totally disregarded or, in one or two instances, are only touched upon in passing.

The argument that this Court does not have jurisdiction to render a decision with respect to petitioners' claims is premised on a single thesis—that the complaint herein merely seeks legal relief for the unlawful deprivation of a specific contract of employment or the reasonable prospect thereof.

It is, of course, a general and necessary principle that this Court must determine for itself whether a pleading sets up a sufficient right of action, grounded on the Constitution or laws of the United States. (*First National Bank v. Anderson*, 269 U. S. 341, 345-346; *Brown v. Western Ry. of Alabama*, 338 U. S. 294, 296; *Davis v. Wechsler*, 263 U. S. 22, 24.) Respondents' argument cannot be squared with the plain allegations in the complaint [R. 29-41; P. B. 3-7][1] or with respondents' own summary of the complaint (I. R. B. 10-13)[2]

It is admitted by the demurrer filed by respondents that the conduct of respondents has wrongfully and unjustifiedly impaired the petitioners' reasonable expectation of employment in the motion picture industry[3] and their right *to pursue their professions and* occupations" therein [R. 35; I. R. B. 11, 18], and that "as a result thereof" and "by reason of" the acts and agreement of respondents, petitioners have been and they now are "refused" and *"excluded from employment in said industry"* [R. 36; I. R. B. 12]. It is total exclusion from all work opportunity, not the deprivation of a specific contract, which is

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[1]The reference "P. B." is to petitioners' opening brief herein.

[2]The reference "I. R. B." is to the brief of the industry respondents.

[3]An expectation obviously founded on the admitted high reputation and standing of each petitioner for excellence of work in the industry [R. 29].

the wrong committed here. Respondents' position that the complaint was properly dismissed because of the failure to allege a contract or prospect of one (I. R. B. 16) falls together with the erroneous assumption on which it is based. There can be no damage for interference with a contract if there is no contract. But the right to enter the employment market cannot depend upon the assurance of a contract of employment in advance. What petitioners have suffered here is not the relatively minor deprivation of a single contract but the total loss of all opportunity to obtain any contract of employment in the motion picture industry.

Respondents have avoided any discussion of the nature of the constitutional *right to work* (P. B. 21-31); or of the arbitrary action of the judicial arm of the State in denying all relief for an injurious invasion of *such* right (P. B. 31-50); or of the arbitrary denial by the State court of any protection for petitioners' freedom of speech and association from the monopolistic combination which conditioned the *right to work* on the surrender of these fundamental liberties (P. B. 51-80); or of the state court's refusal to afford any protection for the impairment of petitioners' rights as witnesses in a federal forum (depriving them of the *right to work* by reason of their conduct as such witnesses) under the supremacy clause of the Constitution (P. B. 81-92); or of the denial of the equal protection of the laws in the light of the state court's ruling holding in effect that the *right to work* (as distinguished from interference with contract relationships) is not a "legally protected interest" [R. 78; P. B. 92-106]. Respondents' arguments, as a result of their avoidance of the issues, are abstract and untenable.

II.

Respondents Have Not Shown That the Judgments of Dismissal Were Based Upon an Adequate and Independent Non-Federal Ground.

Respondents observe initially, buttressed by an array of decisions (I. R. B. 23-25), that this Court will ordinarily not review a state court judgment based upon an adequate and independent non-federal ground, a rule, to which this Court has constantly adhered. Conversely, however, "it is a necessary and well-established rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny [such] rights." (*Rogers v. Alabama,* 192 U. S. 226, 230. See, *West Chicago Street Railroad Co. v. Illinois,* 201 U. S. 506, 519-520; *C. B. & Q. Ry. Co. v. Drainage Commissioners,* 200 U. S. 561, 580; *St. Louis S. W. Ry Co. v. Arkansas,* 217 U. S. 136, 148-149.) The latter rule is applicable under the facts here. Since the essence of the right asserted by petitioners was the right to seek and compete for employment (P. B. 21-31), the ruling which made the exercise of that right dependent upon the impossible condition of first obtaining a specific contract or prospect of one in the industry from which petitioners had been barred by respondents, necessarily resulted in forever foreclosing the assertion of the fundamental rights alleged in the complaint. The ruling of the state court is inseparable from its effect—the denial of *all* protection to a valuable property right, the right to work. Whether such an absolute denial by a state, particularly under the circumstances of this case, is consistent with constitutional guarantees presents important federal questions; ". . . where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment *without any decision of the other,*

our jurisdiction is plain." (Emphasis added.) (*Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157, 164.)[4]

The decisions cited by respondents in support of the general principle governing this Court's jurisdiction actually illuminate the error in their own argument. A ruling by a state court, for example, that the writ of *coram nobis*, instead of habeas corpus, is the proper remedy to test a denial of constitutional rights is entirely independent of the federal questions involved because, rather than denying all remedy, it relates to the procedural form to be pursued in securing a remedy that does exist, and to the procedural steps or requirements with respect thereto. The same is true of state court rulings on estoppel, waiver, statute of limitations, proper forum, and other related matters (I. R. B. 23-25). But where the claim of a federal right, specifically set up from the very outset, goes to the root of the case and dominates every part of it, a state court ruling which necessarily has the effect of denying the claim of federal right on its merits, brings this Court's review jurisdiction into play. (*C. B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 580-581. See *Creswill v. Knights of Pythias*, 225 U. S. 246, 261; *Postal Telegraph Co. v. Newport*, 247 U. S. 464, 475; *Abie State Bank v. Bryan*, 282 U. S. 765, 773.)

The respondents argue that even if their conduct "were unlawful or unconstitutional" (I. R. B. 26), still, as the

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[4]That an important constitutional question was decided by the state courts is indirectly and inadvertently conceded by respondents when they note that the "sole ground" for the decision below was stated by the District Court of Appeal to be the "absence . . . of any legally protected interest of plaintiffs [which] has been interfered with" (I. R. B. 15). Whether or not the right to work, absent a contract of employment or definite prospect of one, is a property right protected by the Fourteenth Amendment is certainly a question arising under the Constitution of the United States.

state court held, the "causal connection" (I. R. B. 26) between such "wrongful conduct" and the "loss or failure to obtain employment" was not shown (I. R. B. 26). They urge that the judgments of dismissal are not reviewable by this Court since at most the state court ruling was simply "incorrect"; that in fact the ruling was not arbitrary or unfounded since it was "based upon a principle of the law of interference with business relations" (I. R. B. 28) and consistent with a general principle "that wrong and injury must combine" (I. R. B. 28); that only those who are adversely affected can complain of any wrongs done or unconstitutional acts committed (I. R. B. 29).

These arguments are premised on the thesis that the complaint herein seeks relief for interference with some specific contract of employment or prospect of one. Respondents simply ignore the allegations in and the patent theory of the complaint. (See *Boyd v. Thayer*, 143 U. S. 135, 181; *Carter v. Texas*, 177 U. S. 442, 447.) This suit is for interference with the pursuit of a calling, and respondents have admitted that by reason of respondents' conduct petitioners have been unable to enter the employment market and compete for contracts in the industry. The "causal connection" between respondents' conduct and this injury to petitioners' fundamental right to pursue their callings is plain, and is not denied by respondents, even in their brief here (I. R. B. 10-13, 18.)[5]

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[5]Respondents argue that ". . . it appeared from the complaint that any loss of employment or failure to obtain it by petitioner was the result of causes other than the conduct complained of." (I. R. B. 20.) They forget that in their own Statement of the Case (I. R. B. 10, 12) they say: "As a result, and by reason of the acts and agreement of respondents, petitioner has been and is now refused and excluded from employment in the motion picture industry; and will henceforth find it impossible to obtain employment in the profession to which he has devoted a major part of his life and energy. [R. 36.]"

That issue is not what power over local practice the State possesses with respect to the common law tort of interference with contract relations (I. R. B. 21), but whether the constitutional right to work—perhaps the most valuable property right an individual possesses—must be afforded by a state court the guarantees which the Constitution provides therefor. No rule of local law may be applied in such a manner as to deny these safeguards. What the State has done here is to require an allegation of damages of a contractual nature as a condition of a cause of action for invasion of a non-contractual property right.

If this ruling has merit, then a state for any reasons may deny a license to practice law; no federal question can arise as the applicant has sustained no injury because he does not have clients, the possibility of obtaining which is precluded by the denial of the application. The State's position could then be supported by the assertion that its action is merely a result of local practice. Obviously such a contention would be rejected there for the same reasons that it must be here.

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practices." (*Davis v. Wechsler*, 263 U. S. 22, 24.)

The ruling of the state court was unfounded because the requirement for damages it established is without necessary relationship to the injury sustained; so it properly may be regarded as essentially arbitrary and a mere device to prevent a review of the federal questions here involved (P. B. 21-31, 51-87, 92-106). (See, *Postal Telegraph Co. v. Newport*, 247 U. S. 464, 475-476;

American Railway Express Co. v. Levee, 263 U. S. 19, 21; *Hill v. Smith*, 260 U. S. 592, 594; *Young v. Ragen*, 337 U. S. 235, 238.) It is irrational and arbitrary and a denial of the equal protection of the laws for a State to protect an employment contract once acquired, but to leave unprotected by the law any right to acquire it. The constitutional right to seek a livelihood recognizes no such invidious distinction. At least, this Court has the jurisdiction to determine whether it does.[6]

III.

The Respondents Have Not Shown That the Federal Questions Were Not Seasonably and Properly Raised in the State Courts.

Petitioners have set forth in their opening brief a statement of how the federal questions were raised in detail and pursued in all the state courts (P. B. 11-14). Respondents now urge that "none of the federal questions" were raised or decided in the state court of first instance;

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[6]Respondents also argue that the allegations in the complaint of First Amendment violations are little more than conclusionary allegations of belief of the petitioners and are therefore not admitted by the pleadings (I. R. B. 11, 13). Of course, this was not any part of the basis of the state court's decision. In any event allegations upon information or belief such as these are specifically permitted under California Law. California Code of Civil Procedure 446; *Pridonoff v. Balokovich*, 36 Cal. 2d 788; *Roussin v. Stewart*, 33 Cal. 208. As for the allegations being conclusions rather than ultimate facts, it is necessary to go no further than to compare the ultimate facts alleged in the complaint here with the allegations held to be conclusions in the cases relied on by respondents to illustrate the fallacy of this contention: *Faulkner v. Cal. Toll Bridge Authority*, 40 Cal. 2d 317, 329: ("Allegations that the acts of a commission or board were 'arbitrary, capricious, fraudulent, wrongful and unlawful' "); *Callahan v. Broderick*, 124 Cal. 80, 82 (allegations that demands "are not lawful", are "for expenses not allowed to be paid out of said fund" and are drawn upon a fund under a section of law which is "unconstitutional and void"); *Gosewisch v. Doran*, 161 Cal. 511, 515 (allegation "that the publications charging him with misconduct were not pertinent or material").

that "none of them was raised," or decided in the State District Court of Appeal (I. R. B. 8). These sweeping assertions are unfounded, contrary to the record, and specious.

The respondents assert that the complaint was "not framed to raise or put in issue any right under the Constitution or laws of the United States," that "no federal right was alleged"; that "no provision of the federal Constitution or of any federal law was pleaded or otherwise referred to" (I. R. B. 3).

Contrary to respondents' blanket assertions, the complaint was framed to put in issue rights under the Constitution or laws of the United States. These included the right to follow a chosen calling [R. 9, 29, 35, 36]; the right to freely attend or decline to attend, if not summoned, hearings before a Congressional committee and to freely exercise before such committee constitutional privileges including First and Fifth Amendment privileges [R. 9, 35], and the right to freedom of speech and assembly free from coercion and interference [R. 9, 37]. The complaint alleged that the aforesaid rights had been invaded by respondents and sought legal and equitable relief.

California requires precisely such a concise statement of the *facts* showing how the constitutional questions arise; not a statement or conclusion of law governing the facts. (Code Civ. Proc. Sec. 426; *Callahan v. Broderick*, 124 Cal. 80, 82-83, 56 Pac. 782; *Vallindras v. Massachusetts, etc., Ins. Co.*, 42 Cal. 2d 149, 151, 265 P. 2d 907; *Scully v. State of California*, 20 Cal. 2d 178, 180, 124 P. 2d 609; *Foerst v. Hobro*, 125 Cal. App. 476, 478, 13 P. 2d 1055.)

The respondents demurred generally to the original complaint [R. 16]. The general demurrers were sus-

tained in a minute order without opinion, with leave to amend [R. 28]. The amended complaint was precisely the same as the original complaint, as respondents concede (I. R. B. 4, Fn. 2), except for the omission of two words—"blacklist" and "conspiracy"—which the trial court may have considered to be mere conclusions of law. Since the court had written no opinion and since the original complaint may have been dismissed solely because of the conclusionary allegations, petitioners exercised their right to amend.

In California, an amended complaint supersedes the original. (*O'Brien v. O'Brien*, 50 Cal. App. 2d 658, 660, 123 P. 2d 877.) The amended complaint, the one involved herein, asserted all the federal rights which had been asserted in the original complaint [R. 29-41]. Respondents again demurred generally [R. 41]. This time the demurrers of the industry respondents were sustained without leave to amend [R. 55], but with the rendition of a written opinion [R. 44-54].

The written opinion of the Superior Court, apart from its merits, is a complete refutation of respondents' arguments that "no federal right" was pleaded or put in issue in the lower court. The Court recognized that petitioners were asserting a right to pursue their chosen professions in the motion picture industry [R. 48]; a right to attend as witnesses in a federal forum and to invoke their federal constitutional privileges without losing their right to work [R. 52, 53]; and their rights to freedom of speech, press and assembly [R. 50-52].[7]

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[7]Apparently aware that the opinion of the Superior Court undermines their assertions, respondents state that "in California practice the memorandum opinion of a trial court cannot be used on appeal to impeach or vary its findings or judgment" (I. R. B. 6, fn. 5). Even if this were so, the opinion still reveals that the

The action of the trial court on dismissing the amended complaint was the first definitive action by the State. Respondents assert that petitioners failed to move to reconsider (I. R. B. 5), and therefore lost all right to complain thereafter. How baseless this argument is can be observed from the trial court's ruling. Respondents before the trial court urged that petitioners had not alleged the existence of any specific contract and that, in any event, respondents' admitted conduct was justified as a matter of law. On the only issue with which we deal here—the question of the need for pleading the existence of a specific contract—*respondents' objections were overruled and the petitioners' position was sustained* [R. 45, 48]. Respondents are, therefore, urging that petitioners, to save their rights, should have moved for reconsideration on an issue determined in their favor.[8]

In California, an order sustaining a demurrer without leave to amend is followed by a final judgment of dismissal of the action, reviewable on appeal. Where the errors complained of are errors of law, motions for reconsideration are ordinarily not required in the trial court, and the proper method of review is by appeal. (*Mattox v. Isley*, 111 Cal. App. 2d 774, 780, 245 P. 2d 664.) In

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federal questions were raised and argued in the trial court. However, Rule 5(a) of the Rules on Appeal (West's Ann. Calif. Code Rules) requires the clerk's transcript to include "any written opinion of the Superior Court," and such opinion can be used as an aid to the appellate court in ascertaining the process by which the judgment has been reached. (*Union Sugar Co. v. Hollister Estate Co.*, 3 Cal. 2d 740, 749, 47 P. 2d 273; *People v. One 1951 Ford Sedan*, 122 Cal. App. 2d 680, 683, 265 P. 2d 176.)

[8]Respondents recognize that petitioners were successful on their right to sue without the necessity of pleading the existence of a specific contract because they state that a judgment sustaining a demurrer to a complaint may be affirmed on appeal in California "regardless of the ground upon which the trial court may have sustained it." (I. R. B. 6, fn. 5.)

this case, in the light of the definitive written opinion of the trial court, and its refusal of leave to amend, it is plain that the only recourse was by appeal from the judgment which had been entered against petitioners, solely because they did not plead that respondents' conduct lacked justification.

In opposition to the petition for a writ of certiorari, respondents themselves stated: "In California practice, questions are raised on appeal in the briefs of the parties" (*Brief in Opposition*, p. 1, Fn. 1). Indeed, it is only in the briefs on appeal that errors can be urged. (*Rules on Appeal*, Rules 13-16.) Yet, respondents now claim that the briefs are not part of the record and that jurisdiction cannot be sustained by reference to the briefs (I. R. B. 35). Respondents appear to have overlooked that they themselves proposed a supplemental record in this Court containing the briefs on appeal, and this was done because, respondents asserted, the briefs were "necessary to ascertain when and in what circumstances the constitutional question posed here was raised below" (*Brief in Opposition to Petition for Certiorari*, p. 1, Fn. 1; see also, *Konigsberg v. State Bar of California*, 353 U. S. 252, 254-258).

Although respondents labor to prove that the federal questions presented in the District Court were of too much "generality" and "imprecision" (I. R. B. 36), they find it difficult to deny that both the respondents and the court were plainly and specifically advised that petitioners were asserting the deprivation of federal rights under the Constitution and laws of the United States (I. R. B. 36-37, Fns. 26, 27). It would unduly lengthen this brief to once again spell out the federal questions raised in the District Court of Appeal and supported there by references to the privilege against self-incrimination guaranteed by the fed-

eral Constitution, the Fourteenth Amendment and opinion of this and other Courts dealing with the constitutional rights here involved (see P. B. 12, 13). Suffice it to note at this point that deprivation of the liberty to pursue chosen callings, as distinguished from interference with a specific contract, in violation of the due process and equal protection clauses of the Fourteenth Amendment was repeatedly urged (Pet. Op. Br. in Dist. Ct. of App., pp. 7, 10-12, 18-21, 26, 41-42, 43;[9] Pet. Rep. Br. in Dist. Ct. of App., pp. 2-3, 10-11, 15-25, 31, 33-34, 37-38, 40-41, 44, 58-59, 60-61, 68); as were petitioners' rights freely to attend a Congressional hearing and to exercise their First and Fifth Amendment privileges in such federal forum. (Pet. Op. Br. in Dist. Ct. of App., pp. 21-23, 24-29, 29-33; Pet. Rep. Br. in Dist. Ct. of App., 61-62, 64); and the claim that petitioners' exercise of freedom of speech and assembly had been abridged (Pet. Op. Br. pp. 36-39; Pet. Rep. Br. pp. 10-12, 57-58, 60-61, 66); and that the State could not, consistently with the provisions of the Constitution of the United States, immunize and permit this monopolistic combine to deprive persons of their right to work solely because of the exercise of First and Fifth Amendment privileges in a federal forum (Pet. Op. Br. pp. 15-18, 21-36, 41-42; Pet. Rep. Br. pp. 40-41, 64-66). To all of this should be added that respondents in their own brief before the District Court of Appeal argued by way of reply each and every one of the aforesaid federal questions (Resp. Br. pp. 41-45, 59-78).

But, respondents argue, these constitutional issues were raised in connection with the question as to whether lack

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[9]Respondents in their reply brief answered the point "made by appellants of a constitutional 'right to work' and of the impairment of that right by the action of the respondents" (Resp. Br. in Dist. Ct. of App. p. 62) in part by renewing their argument, lost below, that petitioners had not pleaded the existence of a specific contract (Resp. Br. pp. 15-24).

of justification had to be pleaded by petitioners, and, therefore, they can not now be urged as applicable to the appellate court's ruling relating to the absence of a contract (I. R. B. 35-36). This contention overlooks the fact that the trial court had ruled in petitioners' favor on the contract issue and that the petitioners' emphasis was necessarily focused on the issue of justification on which they had lost rather than a matter with respect to which they had prevailed. Contrary to respondents' assertion that immediately upon the ruling by the trial court, the constitutional issues arising out of a ruling predicated on the failure to plead the existence of a contract could be perceived "without possession of any gift of prophecy" (I. R. B. 34), it would have required precisely such a capacity to anticipate that the Court of Appeal would ignore the reason for the trial court's ruling and would base its decision on a ground rejected by the trial court.

The decisions relied on by respondents on appeal and by the court below to support its ruling dealt exclusively with interference with contract relations and had no applicability to an action which sought to protect the right to pursue a calling, a right which the State had assured its citizens would always be protected. (*James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329; *Bautista v. Jones*, 25 Cal. 2d 746, 155 P. 2d 343.) The ruling of the District Court of Appeal, accepting for the first time respondent's position, was therefore in any event a surprise, and the constitutional questions raised in the petition for rehearing would therefore have been timely enough to invoke this Court's jurisdiction. (*Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 677.)

Moreover, the essence of the argument made below by petitioner was that the dismissal of the complaint and the denial of relief violated their constitutional rights.

Whether the ruling was on one ground or the other, it was the same constitutional rights that were involved and the claim of which was presented to the Appellate Court.

Respondents do not seriously challenge the fact that the federal questions arising out of the right to work and its relation to the issue of the need of pleading the existence of a specific contract under the due process and equal protection clauses of the Fourteenth Amendment were raised in the petition for rehearing (I. R. B. 8). Nor do they deny that the same questions were extensively pressed in the petition for rehearing to the Supreme Court of California (I. R. B. 7).[10]

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[10]The District Court of Appeal stated: "In view of our conclusion, we do not reach other points argued by counsel" [R. 77]. On rehearing, petitioners therefore again urged the unconstitutionality of the ruling which prevented consideration of the related federal questions. Respondents now suggest that the other federal questions raised and argued before the court, but not passed on as aforestated, should have been repeated in the petition for rehearing (I. R. B. 8, fn. 10) to permit consideration of the questions here. Respondents point to no state or federal requirement to that effect. Clearly, the necessary effect of the denial of the petition for rehearing, as in the original ruling itself, was to deny all the federal rights asserted in the complaint and throughout all the judicial proceedings. *C.B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 580-581. Although the petition for rehearing specifically alleged that the court's ruling denied petitioners their rights under the Fourteenth Amendment, respondents assert that in the petition for hearing to the Supreme Court respondents did not mention the specific constitutional provision in their claims of denial of due process of law and the equal protection of the laws (I. R. B. 7). Aside from the fact that the petition for rehearing is a part of the record before the Supreme Court (Rules on Appeal, Rule 28(b)), and aside from the fact that California does not have an "equal protection" clause (*Cf. New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 69), the contents of the extended petition and the citations of applicable decisions of this Court involving claims of federal rights under the Fourteenth Amendment amply establish that the claim of the invalidity of the ruling of the District Court of Appeal by reason of its contravention of the federal Constitution was clearly presented, as were all the federal questions here involved.

It is submitted, therefore, that respondents' position here is entirely untenable. The federal claims were seasonably brought to the attention of respondents and to the State court from the very inception of the proceedings, and diligently pursued throughout the state court proceedings. "And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." (*New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67.)

IV.

Respondents Have Not Shown That the Denial of Petitioners' Federal Rights Were Not Caused by the Action of the State.

On this issue, respondents have avoided any answer to petitioners' arguments in a number of significant respects. If the ruling of the court below denying all protection for the right to work to that class of persons who cannot show the existence of a specific contract is an irrational and arbitrary classification and a denial of the equal protection of the laws (P. B. 92-106), it cannot be successfully argued that this was "private action." Plainly the denial of the equal protection of the laws flows solely from the ruling of the judicial arm of the State. (*Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 682.)

In the second place, if petitioners had the right to freely attend as witnesses in a federal forum and exercise their privileges under the federal laws and Constitution, the protection of that right could not be denied by the judi-

cial arm of the State because the Constitution and laws of the United States are the supreme law of the land (P. B. 81-87). In such case, it is the supremacy clause of the Constitution which is invoked, and questions relative to the abridgment of rights by the State under the Fourteenth Amendment are not involved.

This Court's jurisdiction to review in the above instances has not been discussed by respondents. This question of "state action" with respect to these and other violations of constitutional rights has been extensively discussed in petitioners' opening brief (P. B. 31-50). We do not repeat the arguments here but they are, it is submitted, a refutation of respondents' contentions (I. R. B. 40-52). We make here only a few comments on some of the broad propositions advanced by respondents.

The respondents place great stress upon the distinction between judicial "enforcement" which results in the abridgment of federal rights, and judicial "denial" which results in the same abridgment of the same rights. They concede that if the admitted wrongdoers here had been foolhardy enough to ask the state court to "enforce" their concerted agreement and uphold their unlawful conduct, as a result of which the petitioners had been deprived of their right to pursue their chosen callings, then the State would have "acted" and this Court's jurisdiction to review would be plain (I. R. B. 43). But when the wrongdoer, a monopoly controlling all employment opportunities in the industry, by conspiracy, coercion and blacklist inflicts the same deprivations of fundamental rights, then the refusal of all relief and the immunization of the wrongdoers by the State judicial arm is not the "action" of the State, argue the respondents. This Court's jurisdiction to review the claimed deprivation of liberty and property under the

Fourteenth Amendment is thus made to turn on whether the wrongdoers went into court initially to obtain a license from the State for their wrongdoing, or whether they obtained their license from the State by successfully persuading the judicial arm to arbitrarily deny all legal and equitable relief to their victims. It is respectfully submitted that this Court's jurisdiction under the Constitution cannot be made dependent merely upon the location of the parties in the title of an action.

If constitutional rights are to be protected, the crucial question must be—what federal rights have been denied and what kind of wrong has the judicial arm of the State *sanctioned* in the particular proceedings? There is no constitutional right to some specific rental space, or to membership in a club or fraternity, or to employment in an "open shop" (I. R. B. 44, Fn. 32). But when an arbitrary ruling of the judicial arm of a State sanctions the admitted unlawful conduct of a monopoly which deprives persons of their right to pursue their chosen callings solely because of the exercise of federal privileges in a federal forum, it is simply unreal to argue, as respondents do, that the State has been "inactive." "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." (*Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 682.) The exercise of the judicial power of a State must be exerted in subordination to the principles of "right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve," and an "arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practi-

cally sanctioned and the owner stripped of all real remedy, is wholly at variance with these principles." (*Truax v. Corrigan*, 257 U. S. 312, 329.)

The respondents argue that for this Court to take jurisdiction in these proceedings would require "an interpretation of the Amendment amounting to a reversal of the one which it has received from this Court since the *Slaughter House Cases*" (I. R. B. 43); that if the ruling and judgments of the Court below is the action of the State, "then all private conduct not prohibited by positive State law is state action" (I. R. B. 44). It is urged that the "furthest limits" to which "this Court has been willing to go are represented by the decisions in *Shelley v. Kraemer*, 334 U. S. 1; *Barrows v. Jackson*, 346 U. S. 249, and *Marsh v. Alabama*, 326 U. S. 501 (I. R. B. 45).

These generalizations on the part of respondents appear unjustified. There is no warrant for the conclusion that a ruling by this Court holding that the immunity granted by the State to *these wrongdoers* in *these proceedings* under the circumstances alleged in *this complaint* will destroy the "line between the sphere of State and Nation" (I. R. B. 42). The case herein is not merely one of "private conduct not prohibited by positive state law." It is state sanction of a highly injurious invasion of federal rights by a monopolistic combination exercising powers which belong to the state.

Respondents' analysis of the *Shelley*, *Barrows* and *Marsh* decisions appears narrow (see P. B. 37-41). Respondents recognize that in each of these cases there was action by the State, "through its courts or its legislature" which had the "effect" of putting behind the private agreements or conduct involved "the coercive power of the State" (I. R. B. 45). But respondents insist that the

coercive power must be manifested by the imposition of "civil or penal sanctions" (I. R. B. 45). It is submitted that such view is not only illogical but untenable if constitutional rights are to be protected. The coercive power of a State can be manifested in sustaining an action for damages or injunctive relief, and it can be equally manifested by denying such relief.

> "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to *exertions of state power in all forms.* And when *the effect of that action is to deny rights* subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." (*Shelley v. Kraemer,* 334 U. S. 1, 20 (emphasis supplied).)

Even if the technicality of whether the state has acted affirmatively or negatively were determinative here, respondents would be in no better position. Certainly if the state legislature were to enact a permissive statute covering the kind of conduct engaged in by respondents, that would be state action. Under California law the decisions of its courts, like statutes, become part of the total body of state law (Cal. Code Civ. Proc., Secs. 1895-1899, see Appx. A). Thus in handing down its decision in this case the District Court of Appeal promulgated law for the state just as effectively as if the legislature had adopted a statute. The state can no more disclaim responsibility for this action than it could if its legislature were to adopt a statute or its courts were to hand down a decision establishing immunity for all private assaults upon witnesses who exercise their constitutional privileges before a federal legislative committee.

Respondents' attempt to distinguish *Marsh v. Alabama*, 326 U. S. 501 (I. R. B. 46, 47), is self-defeating. If the State of Alabama had sanctioned "private" punishment by the company town for the exercise of First Amendment rights, instead of exercising its own coercive power, the violation of constitutional rights would have been more rather than less patent. Assuming that in *Konigsberg v. State Bar*, 353 U. S. 252, and *Schware v. Board of Bar Examiners*, 353 U. S. 232, the state had not acted directly but had permitted private associations to control the right to practice law and to exclude the petitioners in those cases from the bar, would the results in those cases have been any different because of the claimed absence of state action? The disclaimer of state action here stands on no better footing.

Respondents distort petitioners' arguments relative to the action of the State in sanctioning the conduct of the monopoly here in excluding persons from their chosen callings in the motion picture industry (I. R. B. 47, 48; P. B. 39-47). They assert that if petitioners were "denied the right to work except at the price of surrendering constitutional right," the denial was simply "the result of voluntary adherence to a voluntary private agreement" (I. R. B. 49). The record is to the contrary. The denial of the right to work became *legally* operative only when the State sanctioned respondents' conduct by declaring that it violated no rights which the court recognized and denying all relief to petitioners.

Respondents seem unable to understand that petitioners were "denied access to courts of the state" (I. R. B. 50). It is captious for respondents to assert that this statement is not correct because the "complaint was filed" and then dismissed (I. R. B. 50). Petitioners' complaint is that

the effect of the state court proceedings is to bar them forever from claiming any judicial relief against respondents' wrongdoing. In that sense, access to the courts has been barred.

The argument that the "motives" of the members of the House Committee is not involved herein is a contrived one. It is not the motives of the committee members of which petitioners complain, but their overt actions in joining the conspiracy alleged in the complaint (P. B. 45-47).

It is submitted that this Court has jurisdiction to review not only the claims of denial of the equal protection of the laws and the claims of denial of federal rights under the supremacy clause, but the claims of deprivation of the right to work without due process of law under the Fourteenth Amendment.

V.

Other Contentions Made by Respondents Are Irrelevant or Plainly Inconsistent With the Record.

1. Judicial Notice of Committee Proceedings Is Proper.

The respondents now urge that it is inappropriate to notice the proceedings of the House Committee on Un-American Activities (I. R. B. 12, Fns. 13, 18-19). In the court below respondents successfully urged the court (Resp. Br. in Dist. Ct. of App., pp. 46-54) to judicially notice that the questions put to petitioners in the legislative inquiry

> "had nothing whatever to do with their political affiliations, associations, or beliefs but concerned their membership in a conspiratorial and revolutionary junta, one of whose objectives is the overthrow of

> our government by force and violence, a malignant force which menaces the very existence of the government" [R. 68].[11]

Respondents do not deny that the arbitrary ruling of the court below was motivated considerably by matters involved in the proceedings of the House Committee and elsewhere of which the court took judicial notice (P. B. 87-93). Nor do they deny that but for this "judicial notice" the respondents' conduct would clearly violate Sections 1101 and 1102 of the California Labor Code, prohibiting discrimination in employment because of political activities.

Since this theory of judicial notice was successfully pressed in the court below, respondents are not in a position to draw the line in the same area at a point where the matters further noticed begin "to pinch." The question is not whether the matters noticed are true or false; the question is simply whether in fact claims of constitutional rights were made, whether censorial statements were made by respondents, whether there were calls for

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[11]The arguments made by respondents in their briefs below went along the following lines. "When the Complaint is Supplemented by Judicial Notice It Shows On Its Face Justification For Respondents' Alleged Agreement Not To Employ Appellants Who By Their Conduct Had Led The Public to Believe That They Were Communists" (Point III, p. 46). "The Proceedings and Reports of Congress and Its Committees, and Facts of Common Knowledge, Such as Prevailing Public Attitudes and the Manner in Which Ordinary Businesses Are Conducted, Will Be Judicially Noticed" (p. 46). "The Prevailing Attitude of the Public Toward Communism and Communists Will Be Judicially Noticed" (p. 49). "Judicial Knowledge Includes Notice of the General Nature of the Motion Picture Business and the Public Attitude Toward It" (p. 52).

blacklisting in the committee hearings, whether there were claims of loss of jobs as a result of respondents' concerted agreement (P. B. 53-59; Appx. B 5-88).

2. Rules of Local Procedure Cannot Override Federal Constitutional Rights.

The argument that no federal question arises from a decision of a state court "made in accordance with its established procedure" (I. R. B. 37) is irrelevant. As respondents concede, this rule prevails where the state court determines questions which do "not involve any right secured by the Federal Constitution" (I. R. B. 37).

3. Matters of Constitutional Rights Rather Than Economic Policy Are Determinative of This Case.

The argument that the state court by its ruling has merely adopted an "economic policy" which this Court should not disturb, lest there be a return to the "Lochner-Coppage-Adkins philosophy" (I. R. B. 38-39), has been treated in petitioners' opening brief (pp. 113-115). Respondents continue to avoid discussing the deprivation of the constitutional right to follow a chosen calling; the "economic policy" they are discussing involves suits for interference with specific contract rights. In any event, a denial of constitutional rights is not immunized from review by this Court by labelling such denial as an "economic policy."

4. The Denial of Equal Protection of the Laws Is Clear.

As to petitioners' claims of denials of equal protection of the laws (P. B. 92-106), respondents' only answer is that the classification is not unreasonable (I. R. B. 39, 40). It is stated that those who have no existing specific contract, "have not been adversely affected in the same way" (I. R. B. 40) as those who did have such specific

contracts. This statement flows from the premise that the cause of action here involved is one for interference with contract relations (I. R. B. 21, 40). If one does not possess such a relationship, there is nothing with which to interfere. But every person residing in the United States has the right to choose and pursue a calling regardless of whether he achieves a business relationship. Therefore to deny that right because of the absence of a business relationship is arbitrary and a denial of the equal protection of the laws. Otherwise a lawyer would be entitled to protection against unjustified interference with his relations with a single client, but his claim to a right to practice law would involve no legally or constitutionally cognizable right.

5. The Clear Denial of Due Process With Respect to First Amendment Rights Is Properly Before This Court.

Respondents urge that questions dealing with denial of "free speech and association under the First Amendment" and the "right to appear as a witness before Committees of the Congress" are "new questions in the cause" and "outside the scope of the questions presented in the petition for certiorari" (I. R. B. 52). That these questions were raised and pursued throughout the proceedings had been discussed in "II" *supra*. That they were raised and subsumed within the questions set forth in the petition for writ of certiorari are demonstrated by respondents themselves (I. R. B. 52, Fn. 38; see also, Rules of Supreme Court, Rule 23(c); see also, Petition for Writ, 3-4, 29-33). On the merits, the respondents decline discussion, stating only that if the aforesaid rights were denied, the "vital element" of state action "is wanting" (I. R. B. 53).

Of course the First Amendment is not *directly* invoked in this case (*cf.*, I. R. B. 53, 54). Presented here is the question whether the state violated the due process clause of the Fourteenth Amendment insofar as, among other things, it refused to protect First Amendment rights encompassed by the Fourteenth Amendment. There can be no doubt of the proposition that were the state to condition the right to pursue a calling upon the surrender of First Amendment rights, the due process clause would be violated. The situation is no less clear when the state sanctions the conduct of a monopolistic combination of private individuals in usurping the power of control over pursuit of a calling within an entire industry and conditioning the right to work therein upon such surrender of constitutional rights.

6. Due Process Has Been Denied With Respect to Fifth Amendment Rights.

So, too, with respect to violation of Fifth Amendment rights (see, I. R. B. 54), the state violates due process when it establishes a policy which in effect delegates to private individuals the power to condition pursuit of a calling upon the surrender of such rights. For just as the state may not consistently with the due process clause discharge an employee solely because of his exercise of the Fifth Amendment privilege against self-incrimination (*Slochower v. Board of Ed. of N. Y.*, 350 U. S. 551, 559) so it may not establish a rule of law granting to private individuals the power to exclude persons from the pursuit of a calling in an entire industry because of the exercise of that constitutional privilege.

7. The Pleadings Clearly Alleged Exclusion From All Work Opportunities by Reason of the Conspiracy Charges.

Respondents state that the District Court of Appeal based its decision

> "upon the *sole* ground that it did not appear from the complaint that the alleged exclusion of petitioners from employment in the motion picture industry was the result of the monopolistic and discriminatory combination among the defendants averred; . . ." (I. R. B. 5).

This construction of the complaint cannot be reconciled with the pleadings on their face [R. 36] or as analyzed by respondents themselves. Thus in their Statement of the Case the respondents accurately summarize a portion of the complaint as follows:

> "As a result, and by reason of the acts and agreement of respondents, petitioner has been and is now refused and excluded from employment in the motion picture industry; and will henceforth find it impossible to obtain employment in the profession to which he has devoted a major part of his life and energy. [R. 36]" (I. R. B. 12.)

The analysis of the complaint to the effect that it alleges no such exclusion can be justified only if pleadings may be construed as meaning the opposite of what they plainly say.

8. The Committee Respondents Are Liable for Their Private and Official Acts in Furtherance of the Conspiracy Into Which They Admittedly Entered.

In reply to the brief of *amicus curiae*, the argument is advanced that the complaint does not specify what was done by the Congressional Committee respondents in their

official capacities and what in their unofficial capacities; accordingly, the argument continues, it must be presumed that the official acts were not the wrongful acts complained of (A. C. R. B. 3).[12] This argument is bottomed on a complete disregard of the allegations of the complaint. It is there alleged and accordingly admitted here that with respect to the matters alleged in the complaint these respondents acted in *both* capacities [R. 8]. Patently it was possible for these respondents to take official action in support of the blacklist conspiracy charged and *also* to participate in their private capacities in that conspiracy. This is precisely what the complaint charges and what is admitted here.

Respondents also urge that the Congressional Committee respondents may not be held responsible for what they are alleged to have done in their official capacity because of their constitutional immunity (A. C. R. B. 10-12). The immunity argument must fall for two reasons. First, the complaint does not allege that the official action of these respondents was limited to things said or done in a session of the House or of the Committee. Although the Court can take judicial notice of the fact that some of the conduct complained of took place during sessions of the Committee it does not follow that all of it did. If respondents' contention is that their conduct was so limited, that is a matter of defense to be appropriately raised in the state court.[13] Second, even with respect to what is said at Committee hearings, the immunity ends when the

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[12]Referring to "Brief for Industry Respondents in Reply to Brief for Amicus Curiae."

[13]There is nothing before this Court to indicate that the state law requires an allegation in the complaint negating the possibility that official acts were within the area of immunity. And, of course, this is not the basis of the state court's ruling.

bounds of legislative powers are exceeded and the functions of the Judiciary or the Executive are usurped. (*Tenney v. Brandhove*, 341 U. S. at 367-378.) Here the Committee acted as a legislature *and* as a court performing both functions simultaneously while sitting in judgment on individuals for violating standards which it set. Regardless of what their motives may have been, what they did—the taking of steps to put the blacklist into effect pursuant to the conspiracy—[14] was in excess of the powers of these respondents. For their excesses the Constitution provides no immunity.

9. The Supremacy Clause of the Constitution Is Applicable Here.

Respondents also argue in their brief in reply to *amicus curiae* (A. C. R. B. 13-16) that the supremacy clause does not "compel recognition of a cause of action for alleged private interference with the self-incriminating privilege" (A. C. R. B. 13); that Congress has not acted to protect the privilege against private interference and Congress is not required to so act. It follows, argues respondents, that the states have no obligation to do that which even the federal government has not done.

The difficulty with respondents' position, if it were otherwise meritorious, is that it distorts the case here. The basic federal right involved here is the right of per-

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[14] It is urged that Committee member respondents may not be held responsible for what their predecessors or colleagues said and did (H. C. R. B. 8, fn. 5). This is so, *unless* the respondents adopted and continued the policies and program previously established by the Committee and endorsed by their colleagues. In any event the full implication and effect of what respondents said and did can best be weighed and understood in the context of the Committee's history and record. When this is done, the fact that respondents participated in a course of action to blacklist petitioners is made very apparent.

sons *to attend as witnesses in a federal forum* and freely assert privileges secured to them by the Constitution of the United States. It is doubtful that such a plain federal right requires the enactment of a federal law before it can be protected from private interference, but the Congress has enacted laws relative to the attendance of witnesses before legislative committees and this Court has time and time again emphasized the right of witnesses under the Constitution of the United States to invoke the guarantees of that fundamental law (P. B. 81-85).

The supremacy clause and federal public policy embodied in federal legislation does require that the state grant relief against private action which penalizes individuals for their exercise of the federally guaranteed rights here involved. For such private action interferes with the functioning of a branch of the federal government and with the performance by petitioners of their duties to the federal government. The respondents' assertions to the contrary are supported by no authority other than three cases holding that the privilege of the Fifth Amendment may be fully satisfied by a grant of immunity, regardless of other consequences that may flow from compelled testimony[15] (A. C. R. B. 4, 14) and simply ignore those cited by petitioners (P. B. 86-87).

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[15]These cases deal with the right of the *federal government* to substitute immunity for the privilege, because the privilege does not offer protection against the *consequences of testimony*, unrelated to possible criminal prosecution. This is a far different thing from holding that private individuals may conspire to impose a penalty upon a person because of the lawful manner in which he has testified and relied on his privilege before a federal tribunal. There may be no constitutional protection accorded against the incidental effect of testimony lawfully obtained; such protection certainly exists against those who deliberately combine to deprive a person of his property and liberty because of his performance of a duty to the government in a manner of which they disapprove.

Petitioners argue that 18 U. S. C. 241 only applies to citizens and that it is inapplicable here because there is no allegation of citizenship of petitioners (A. C. R. B. 16). Section 18 U. S. C. 242 (a criminal statute not limited in its application to citizens), also relied on by petitioners is disregarded by respondents. These two sections were cited by petitioners (P. B. 86) not as being in and of themselves the basis of the complaint but rather as indicating the policy of Congress that private individuals should not be allowed to interfere with the exercise of federal rights and privileges. This indication of policy supplements and strengthens the general principle applicable to this case that a state has the duty under the supremacy clause to protect, against private interference, individuals who are exercising federal rights and performing federal duties. (*Cf., Brewer v. Hoxie School District No. 46*, 238 F. 2d 91, 103-104.)

VI.

The Remaining Respondents Clearly Demonstrate by Their Argument the Validity of Petitioners' Position.

The respondent Committee members and investigators have simply chosen not to answer petitioners' arguments (P. B. 116, 117). They devote some portions of their brief to a reiteration of arguments made by the industry respondents (R. R. B. 4-8, 14-17).[16] They then argue that no cause of action is asserted against them in their official capacities (R. R. B. 8-12), and that none could be asserted against them in such official capacities (R. R. B. 12-14).

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[16]The reference "R. R. B." is to the brief of the remaining respondents, Doyle, Jackson and Wheeler.

On the other hand, these respondents are clear that they have been charged in the complaint with acting in their individual and non-official capacities. They ask this Court to "take judicial notice that such acts [the acts charged in the complaint] are no part of the official duties of Congressmen and employees of Congressional Committees" (R. R. B. 11). They repeatedly insist that their admitted acts were "not within the scope of their official duties" (R. R. B. 3). If this be so, then respondents here are in precisely the same position as the industry respondents.[17] Indeed, they received the same grant of immunity from the state court as did the industry respondents. For all of the reasons discussed in petitioners' briefs, this Court has jurisdiction to review the judgments of dismissal with respect to these respondents as well as the industry respondents.

Respectfully submitted,

ROBERT W. KENNY,

BEN MARGOLIS,

Attorneys for Petitioners.

SAMUEL ROSENWEIN,

Of Counsel.

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[17]However, as we noted above, respondents admit that they participated in the conspiracy charged both officially and in an unofficial capacity.

APPENDIX A.

Section 1895, California Code of Civil Procedure. LAWS WRITTEN OR UNWRITTEN. Laws, whether organic or ordinary, are either written or unwritten.

Section 1896. WRITTEN LAWS DEFINED. A written law is that which is promulgated in writing, and of which a record is in existence.

Section 1897. CONSTITUTION AND STATUTES. The organic law is the Constitution of Government, and is altogether written. Other written laws are denominated statutes. The written law of this State is therefore contained in its Constitution and statutes, and in the Constitution and statutes of the United States.

Section 1898. PUBLIC AND PRIVATE STATUTES DEFINED. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

Section 1899. UNWRITTEN LAW DEFINED. Unwritten law is the law not promulgated and recorded, as mentioned in Section 1896, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts, and the treatises of learned men.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

Brief in Opposition to Petition for Certiorari and in Reply to Brief of Amicus Curiae.

IRVING M. WALKER,
811 West Seventh Street,
Los Angeles 14, California,
HERMAN F. SELVIN,
[illegible]
Los Angeles 17, California,
Attorneys for Defendants-Respondents,
GUY RICHARDS CULP,
[illegible]
Los Angeles 17, California,
Attorney for Respondent [illegible]

[illegible] Law Printing Co., Los Angeles, Phone MA. 6-3074.

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IN THE

Supreme Court of the United States

October Term, 1956
No. 552.

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

Brief in Opposition to Petition for Certiorari and in Reply to Brief of Amicus Curiae.

Preliminary Statement.

First: The record which petitioners have caused to be prepared does not contain the material necessary to ascertain when and in what circumstances the constitutional question posed here was raised below. Accordingly, we have filed with this brief, pursuant to Rule 21(6), a supplemental record (hereinafter referred to as "Supp. R.") containing that material. From this record it will be seen that the constitutional question was not raised in the trial court; and that it was not raised on appeal until after the cause had been decided on the merits.[1] Never-

[1] In California practice, questions are raised on appeal in the briefs of the parties. [*Epperson v. Rosemond*, 100 Cal. App. 2d 344, 347, 224 P. 2d 480; *California Portland Cement Co. v. Boone*, 181 Cal. 35, 43, 183 Pac. 447, 450-451; *Grayson v. Grayson*, 132 Cal. App. 2d 471, 282 P. 2d 565.] Accordingly, the supplemental record which we have caused to be prepared contains the briefs in the District Court of Appeal. The Clerk did not number the pages of this record consecutively. So, references are to the pages of the particular document indicated.

theless, at page 9 of the petition, without supporting reference to the record, petitioners say that they urged on appeal to the state court the contention "that the judgments of the Superio. Court deprived petitioners of their liberty to pursue their chosen callings in violation of the applicable provisions of the state Constitution and the Fourteenth Amendment. . . ." That statement is misleading in so far as it conveys the impression that the question was seasonably raised. Actually, the existence of such a question was suggested for the first time in the case in a petition for rehearing filed after decision on the merits by the District Court of Appeal. [R. 184-187.] The same suggestion, along with a number of other points, was made in a subsequent petition for hearing in the state Supreme Court after decision by the District Court of Appeal. [R. 225-228.] In respect of the constitutional question, each of those petitions was resisted by respondents on the ground, among others, that the question was raised too late. [Supp. R. (Ans. to Pet. for Rehear.) 4-5; (Ans. to Pet. for Hearing) 12.] The petitions were denied without opinion. [R. 199, 275.] It cannot, therefore, be said that the federal question was decided below. For all that appears in the record here, that question might have been by-passed solely because of the untimeliness of its presentation.

Second: Petitioners treat their complaint as adequately alleging facts showing that "by reason of the acts and pursuant to the agreement of respondents, petitioners have been refused and excluded from employment in the industry. . . ." [Pet. 12.] The state court did not so read the complaint. Rather, it held that the complaint alleged only that at some unspecified time before the re-

spondents had made the agreement complained of, the petitioners had been employed in the motion picture industry; that it was not shown when or why that employment had been terminated, but the necessary inference was that it had ended as the result of facts wholly disconnected from the agreement and that those facts were still effective. So, the court concluded, it could not be inferred from the complaint that the alleged unlawful combination was the cause of petitioners failure to obtain employment. [Pet. App. A, 15-17.]

Thus, we see that the lawfulness of respondents' agreement was not decided below. The question which was decided was whether persons, who had not been shown to have lost employment or an employment opportunity as the result of an alleged tortious agreement restricting employment, had any standing to complain and obtain relief in respect of that agreement. That is quite a different question from the one which petitioners now urge, postulated, as the latter question is, on the assumption that petitioners' failure to obtain employment was the result of the respondents' allegedly unlawful agreement.

Manifestly, the question actually decided below has none of the constitutional implications which petitioners and *amicus curiae* purport to find in the case. [*Cf. McCabe v. A. T. & S. F. Ry. Co.*, 235 U. S. 151, 162-164; *Tileston v. Ullman*, 318 U. S. 44.] Nevertheless, when we reach the substantive merits of their argument [Points II, III; *infra*] we shall treat the problem on the footing upon which they seek to place it. Yet, it is apparent that if certiorari were granted, consideration of the cause on the merits could only lead to the conclusion that the

question raised in the petition was not really involved.[2] In that event, dismissal of the writ as improvidently granted would be the appropriate and likely order. [See, *e.g., Ellis v. Dixon*, 349 U. S. 458.] There is, therefore, no sound reason to issue the writ.

Third: In California practice a demurrer admits only the facts well-pleaded. It does not admit conclusions of the pleader or argumentative or epithetical averments. [*Faulkner v. California Toll-Bridge Auth.*, 40 Cal. 2d 317, 329, 253 P. 2d 659, 667; *Bentley v. Mountain*, 51 Cal. App. 2d 95, 98, 124 P. 2d 91, 93; *Gosewich v. Doran*, 161 Cal. 511, 515-516, 119 Pac. 656, 658.] Nor does

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[2]The construction to be given a pleading and the question whether a complaint states a cause of action under state law are, of course, matters of local law not reviewable here. [*Vandalia Railroad v. South Bend*, 207 U. S. 359, 367; *Osborne v. Gray*, 241 U. S. 16, 20; *Chicago etc. Ry. v. Whiteaker*, 239 U. S. 421, 424; *Washington v. Miller*, 235 U. S. 422, 429.] When a federal question is raised in a state court, this Court on review may decide for itself whether the facts alleged are sufficient. [*Ellis v. Dixon*, 349 U. S. 458, 463-464; *Brown v. Western Ry.*, 338 U. S. 294, 296; *Ward v. Love County*, 253 U. S. 17, 22.] But that only means that a federal right cannot be evaded or its assertion made difficult by local practice. [*American Ry. Exp. Co. v. Levee*, 263 U. S. 19, 21; *Davis v. Wechsler*, 263 U. S. 22, 24-25.] It does not mean that the state courts are not free to decide questions of local practice as they will, when only local rights are put in issue. At bar, there was no assertion in the trial court, or in the District Court of Appeal until after the latter court's decision, of any federal right. So, there was no evasion of any federal question. Consequently, the state court's reading of the complaint should be conclusive here. [See, *Osborne v. Gray, supra*, 241 U. S. at 20-21; *Zorach v. Clauson*, 343 U. S. 306, 311 (note 7); *Nickel v. Cole*, 256 U. S. 222, 225; *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651, 655; *Long Sault Development Co. v. Call*, 242 U. S. 272, 277.]

it admit allegations contrary to facts judicially noticed; for such facts are deemed included in the complaint. [*Chavez v. Times-Mirror Co.*, 185 Cal. 20, 23, 195 Pac. 666, 668; *Hammell v. Britton*, 19 Cal. 2d 72, 75, 119 P. 2d 333, 334-335; *Weil v. Barthel*, 45 Cal. 2d 835, 837, 291 P. 2d 30, 31.] On demurrer the complaint will be liberally construed; but it will still be deemed to state the strongest case open to the pleader. [*Faulkner v. California Toll-Bridge Auth, supra*, 40 Cal. 2d at 328, 253 P. 2d at 666, and cases there cited.] Allegations not made will not be added by strained construction. [*Estrin v. Superior Court*, 14 Cal. 2d 670, 677, 96 P. 2d 340, 343.]

From the application of these rules of California practice the state court arrived at the interpretation of the complaint to which we have already referred. [Par. *Second, supra.*] It also concluded, from its judicial notice of the proceedings of the House Committee on Un-American Activities,[3] that the questions which petitioners had refused to answer before that Committee did not relate to their "political affiliations, associations or beliefs" but did concern their membership in the Communist Party.[4]

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[3]In California the courts take judicial notice of the "Public and private acts of the legislative, executive and judicial departments . . . of the United States. . . ." [*Cal. Code of Civil Procedure*, Sec. 1875(3). See, also: *Arnold v. Universal Oil Land Co.*, 45 Cal. App. 2d 522, 529, 114 P. 2d 408, 413; *Parker v. James Granger, Inc.*, 4 Cal. 2d 668, 677, 52 P. 2d 226, 230, *cert. den.* 298 U. S. 644; *El Zarape etc. Factory v. Plant Food Corp.*, 90 Cal. App. 2d 336, 203 P. 2d 13.]

[4]Petitioners concede that the Communist context out of which this case arose played no part in the result. [Pet. 10, note 1a.]

Jurisdiction.

Jurisdiction is invoked under 28 U. S. C., Sec. 1257(3). It does not, however, exist for the reasons indicated above and set forth below at length. [Point I, *infra*.]

Question Presented.

The respondents were alleged to be in the business of producing and distributing motion pictures and to control, directly or indirectly, all employment opportunities in that industry. Petitioners were alleged to be actors, writers and others who at one time or another had been employed in the industry. It was not alleged that they were so employed at or near the time of the conduct complained of, or that they were then seeking or negotiating for, or had any reasonable prospect of obtaining, such employment. Some time after petitioners were last employed, the respondents allegedly agreed that they would not employ persons who, (a) having been called to testify before the House of Representatives Committee on Un-American Activities, refused on constitutional grounds, including self-incrimination, to answer questions concerning their political affiliations, associations and beliefs; or, (b) having been named as Communists before the Committee refused and failed to appear before it, waive and surrender their constitutional rights and testify as to their political affiliations, associations and beliefs and those of their families, friends, associates and acquaintances. After this agreement had been made, certain of the petitioners were called before the Committee and there refused to answer questions concerning their membership

in the Communist Party; and the others, having been named before the Committee as Communists, refused to appear and testify in respect of that subject. As a matter of state tort law, and before any question of federal due process or equal protection had been raised, the court below held that a complaint alleging the foregoing facts failed to state a cause of action for unjustifiable interference with business relations because the petitioners had not shown that they had an existing or reasonably prospective employment which was interfered with, the existence of such a present or prospective interest being an essential element of a cause of action for relief in respect of the tort which it was claimed had been committed.

In these circumstances the federal question here attempted to be presented is this: Did the state court deny petitioners substantive due process or equal protection in thus defining the elements and limits of the tort in respect of which relief was sought?

ARGUMENT.

I.

The Federal Question Now Presented Was Not Seasonably Raised Below and It Was Not There Decided.

This Court is without jurisdiction of the cause because the federal question which it is now sought to have reviewed was not timely raised below in accordance with the state practice; and it was not, in any event, decided.

First: The question was not raised at all in the trial court. [R. 2-108; Supp. R. (Op. Br. for Plaintiffs-Appellants) 1, 7.] This in itself, precluded review of it in the state appellate courts.[5] [*Imperial Valley L. Co. v. Globe Grain etc. Co.*, 187 Cal. 352, 359, 202 Pac. 129, 131-132; *Herbert v. Lankershim*, 9 Cal. 2d 409, 484, 71 P. 2d 220, 257.] It is similarly non-reviewable here. This Court "is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. . . ." [*Edelman v. California*, 344 U. S. 357, 358. To the same effect: *Mutual Life Ins. Co. v. McGrew, supra*, 188 U. S. at 308-309; *Bailey v. Anderson*, 326 U. S. 203, 206-207; *Hulbert v. Chicago*, 202 U. S. 275.]

Second: The question was first raised, if at all, in the petition for rehearing filed after decision by the District Court of Appeal. [R. 184-187, 233.] According to Cali-

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[5]This rule of California practice is recognized in *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 309.

fornia practice that was too late to require consideration or decision of the question by the appellate courts. [*Prince v. Hill*, 170 Cal. 192, 195, 149 Pac. 578, 580; *Sanders v. Howard Park Co.*, 86 Cal. App. 2d 721, 723, 195 P. 2d 898, 899.] It follows that the denial of that petition, as well as of the petition for hearing in the state Supreme Court,[6] might well have been based on that ground, or upon the failure to raise the question in the trial court. [*Stembridge v. Georgia*, 343 U. S. 541, 547, and cases there cited.] This would be an adequate state ground for the result in the cause; and "when the question of the existence of an adequate state ground is debatable" this Court is without jurisdiction. [*Stembridge v. Georgia, supra*, 343 U. S. at 547-548; *Durley v. Mayo*, 351 U. S. 277, 281-282, 285; *Bachtel v. Wilson*, 204 U. S. 36, 41-42.] In fact, the contrary not appearing from the record, it must be assumed that decision below was placed on the state ground. [*Bailey v. Anderson, supra*, 326 U. S. at 206-207.] Furthermore, the "long-established general rule is that the attempt to raise a federal question after judgment [in the state appellate court], upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. . . ."[7] [*Herndon*

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[6]The proper court to which to direct the certiorari is the District Court of Appeal. [*Hammerstein v. Superior Court*, 341 U. S. 491, 492.] It is, therefore, immaterial why the state Supreme Court may have denied the petition for hearing. [*Ibid.*]

[7]There can be no proper claim that the existence of a federal question could not have been foreseen in advance of the District Court of Appeal's decision. [*Cf. Missouri v. Gehner*, 281 U. S.

v. Georgia, 295 U. S. 441, 443, and cases there cited; *Forbes v. State Council of Virginia,* 216 U. S. 396, 399; *Mergenthaler Linotype Co. v. Davis,* 251 U. S. 256, 258-259.]

Third: The record does not affirmatively show that the federal question was decided below. Yet, unless such an affirmative showing is made this Court will not take jurisdiction. [*Bailey v. Anderson, supra,* 326 U. S. at 207, and cases there cited; *American Ry. Express Co. v. Kentucky,* 273 U. S. 269, 272.] And, if there is any doubt that a constitutional question was decided below, that interpretation of the record will be adopted which will avoid the necessity of deciding the constitutional issue. [*Armstrong v. Armstrong,* 350 U. S. 568, 569; *Black v. Cutter Laboratories,* 351 U. S. 292, 299-300.]

313, 320.] The substantive law ground upon which the cause was decided in the District Court of Appeal was urged by respondents in the trial court and was vigorously renewed as a ground of affirmance on appeal. [Supp. R. (Resp. Br.) 15-24, 78-79.] If acceptance of that ground by the state court would precipitate the constitutional question now posed, that fact was or should have been known to petitioner's as soon as the ground was urged. The first opportunity to advance the constitutional contention, therefore, arose in the trial court not later than the hearing of respondents' demurrer. The opportunity presented itself again, long before decision in the District Court of Appeal, when petitioners filed their brief in reply to respondents' presentation. Nevertheless, petitioners remained silent in this regard on each of those occasions, although they replied at length to respondents' point on substantive, state grounds. They waited until decision had gone against them in both state courts before suggesting the existence of a federal question.

II.

There Is No Federal Question Involved at Bar but Only a Question of the Correctness of a State Court's Decision of Local Law. Such Federal Implications as May Be Involved in That Decision Are Without Substantiality.

Petitioners complain that by the acts of the respondents they have been prevented from pursuing their respective callings in the motion picture industry; and that this consequence of *private* action must be remedied by the state.[8] Petitioners may pursue their calling in one of two ways—by engaging in it as independent entrepreneurs; or by procuring employment from other entrepreneurs such as respondents. The first alternative has not been denied them by any act of respondents or by the decision below. The second alternative, of course, requires the contractual concurrence of others, equally possessed with petitioners of freedom of contract. In this respect petitioners have been told by the state court only that California leaves the making of such contracts to the interplay of the parties' bargaining and economic forces.[9]

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[8]Whether this case presents any question of *state* action—to which alone, of course, the Fourteenth Amendment applies [*Shelley v. Kramer*, 334 U. S. 1, 13; *Civil Rights Cases*, 109 U. S. 3, 10-11] —is a matter which petitioners ignore. [See, Point III, *infra*.] For the purpose of this part of our argument, however, we may assume that the conduct complained of is attributable to the state.

[9]In all accuracy, the decision below did not go even that far. It only went so far as to hold that petitioners had no standing to complain of respondents' conduct because no interest of petitioners was affected by that conduct. [Pet. App. A, 15-17.] Whether one, who has lost an existing or prospective employment as the result of that conduct, would have a remedy is a question not involved or decided below. Even so, we may assume, for purposes of argument, that petitioners were adversely affected by respondent's agreement and that the state has not provided any remedy in the premises. Thus we meet head-on the question which petitioners discuss, but which is not really in issue here. [See, *Preliminary Statement*, par. *Second*, *supra*.]

The question whether a state may constitutionally adopt such a policy of freedom of contract—or, more accurately, whether the state courts are *compelled* by the constitution to reject such a policy—is without substantiality. Petitioners' argument really comes down to nothing more than a complaint that the state court erroneously declared its common law.[10] Even if the state court did err in so declaring (but see note 10, *supra*) no federal question would exist. The Fourteenth Amendment assures neither uniformity of decision nor freedom from judicial error in the determination of questions of local law. [*Milwaukee Elec. Ry. Co. v. Milwaukee*, 252 U. S. 100, 106.]

First: The question whether a cause of action in tort shall be recognized in respect of an agreement by employers not to employ persons who have conducted themselves in a given way is obviously one of local law. [*Black v. Cutter Laboratories, supra*, 351 U. S. at 299; *Neblett v. Carpenter*, 305 U. S. 297, 301-302; *American Ry. Express Co. v. Kentucky, supra*, 273 U. S. at 272-273; *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389, 393-394.]

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[10]The tort of interference with business relations is not defined in any California statute. It is there a creation of the courts, as it is at common law. It was first recognized, in limited scope, nearly seventy-five years ago. [*Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492.] The early limitations have now disappeared; and the doctrine exists in California substantially in its common law form. [*Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P. 2d 631; *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P. 2d 867.] But along with that expansion there was also recognition of one basic limit—that it must appear that but for the alleged interference the business relation involved would have been entered into or continued as the case might be. [*Campbell v. Reyburn*, 129 Cal. App. 2d 232, 234-235, 276 P. 2d 671, 672.] It was that principle which was given effect in the instant case. [Pet., App. A, 9-17.] It is not a principle unique to California; but is one uniformly recognized elsewhere. [See, *Annotation*, 9 A. L. R. 2d 228, 256-257, where the cases are collected.]

It is immaterial whether the state court was right or wrong on that question. An erroneous decision of a question of local law raises no federal question; and this Court is without power to review it. [*Tracy v. Ginsberg*, 205 U. S. 170, 177-178; *Central Land Co. v. Laidley*, 159 U. S. 103, 112; *McDonald v. Oregon Navig. Co.*, 233 U. S. 665, 669-670; *Arrowsmith v. Harmoning*, 118 U. S. 194, 196; *Gryger v. Burke*, 334 U. S. 728, 731.]

Second: "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . ." [*Nebbia v. New York*, 291 U. S. 502, 537.] That is just as true of policies which may be thought to be reactionary or conservative as it is of those which have been challenged because of their supposed radicalism; for the wisdom or desirability of any given state policy is not a matter for this Court's determination.[11] [*Daniel v. Family Sec. L. Ins. Co.*, 336 U. S. 220, 224; *Lincoln Federal L. U. v. Northwestern I. & M. Co.*, 335 U. S. 525, 536-537.] To hold otherwise would require a reversion to what this Court has called the "Lochner-Coppage-Adkins philosophy." [*Day-Brite Lighting v. Missouri*, 342 U. S. 421, 423.] But if, as the repudiation of that philosophy has now made certain, the Fourteenth Amendment did not enact Mr. Herbert Spencer's Social Statics [Holmes, J., diss., *Lochner v. New York*, 198 U. S. 45, 75], it has also made certain that the amend-

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[11]We assume, when its constitutionality is called in question, that a rule or doctrine enunciated by a state court stands on the same footing as an act of the legislature. [See, *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 548; *Hughes v. Superior Court*, 339 U. S. 460, 466-467.]

ment did not adopt any other economic or social theory to which the states must conform.

In its broadest implications, the decision below was that employers are free to agree with each other upon terms and conditions of employment, one of which may be employees' obedience to appropriate inquiries of governmental investigators.[12] [But see note 9, *supra.*] Whatever one may think of the wisdom of that policy, it clearly comes within the wide range of choice open to the state. Freedom of contract cannot be violative of a constitutional provision which guarantees it.

What California has chosen as its policy in this regard is complete freedom of bargaining in respect of employment and employment opportunities. It has elected to "rely for the common good on the free play of conflicting interests and leave conduct unregulated. . . ." [*Hughes v. Superior Court, supra,* 339 U. S. at 468.] To be sure, the state need not have done so. With constitutional propriety it might have adopted a more restrictive policy which would outlaw agreements such as the one here complained of. But the constitution does not *compel* it to do so. Or, as this Court, in another connection, has expressed the same thought, the state "may protect from the consequences of competition but the Constitution

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[12]California, which early recognized the right of employees to combine for purposes of exerting economic force in bargaining [*Parkinson Co. v. Building Trades Council,* 154 Cal. 581, 98 Pac. 1027], has also recognized the employers' right to do the same. [*Speegle v. Board of Fire Underwriters, supra,* 29 Cal. 2d at 40, 172 P. 2d at 871.]. Does the constitution compel California to accord a cause of action to an employer who has been prejudiced in some way by a concerted agreement of employees fixing the terms and conditions upon which they will work; or does the constitutional compulsion which petitioners find extend only to concert of action by employers?

does not. . . ." [*Puget Sound P. & L. Co. v. Seattle*, 291 U. S. 619, 624.]

The fact that the Fourteenth Amendment does not prohibit various types of enactments which curtail or restrict freedom of contract or individual liberty does not mean that the states are inexorably required to make such enactments. Examples to that end are not wanting. Thus, a state may constitutionally prohibit or regulate monopolies. That does not mean that it is required to do so. [*Nebbia v. New York, supra*, 291 U. S. at 529; *Slaughter House Cases*, 16 Wall. (83 U. S.) 36.] It "may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. . . ." [*Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U. S. 287, 295.] It may impose upon an employer punitive damages for wrongful death without regard to malice, oppression or personal fault. [*Pizitz Dry Goods Co. v. Yeldell*, 274 U. S. 112.] But the opposite policy is equally open to it. [See, *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101.] It may abolish common law doctrines such as the fellow-servant rule, contributory negligence and assumption of risk. [*New York Cent. R. R. Co. v. White*, 243 U. S. 188.] Yet no one would argue that it must take that course. A state may permit an injunction to stop picketing to compel employment without racial quotas. It does not have to go so far; and even if it does it need not forbid voluntary adoption of quotas by employers. [*Hughes v. Superior Court, supra*, 339 U. S. at 464-466, 468-469.]

And so with almost every type of regulatory or socio-economic statute or rule whose constitutionality has been

upheld. The constitutional right of the states to enact such legislation or to enforce such rules of law has not been transformed by the Fourteenth Amendment into a command that they do so.

Third: In realistic appraisal, the court below did no more than apply to the facts at bar the familiar common law doctrine of interference with business relations. [Cases cited, note 10, *supra.*] There surely can be no substance to a claim that substantive due process has been denied by adherence to such a widely followed rule of the common law.

Even if the decision represented a departure from the common law, no substantial question of due process would be raised. The states may still create new rights or abolish or modify old ones recognized by the common law. [*Silver v. Silver,* 280 U. S. 117, 122; *New York Cent. R. R. Co. v. White, supra,* 243 U. S. at 198-200, 206; *Wilmington Min. Co. v. Fulton,* 205 U. S. 60, 74.] Having done so, and thereby having made certain conduct lawful, there is no constitutional right to a "remedy" in respect of that conduct. [*Senn v. Tile Layers etc. Union,* 301 U. S. 468, 482-483.]

Fourth: The claim of a denial of equal protection is also without substance. Classification based upon legitimate differences between the classes is not prohibited by the Fourteenth Amendment. [*Jones v. Union Guano Co.,* 264 U. S. 171, 181; *New York R. T. Corp. v. New York,* 303 U. S. 573, 578; *Goesaert v. Cleary,* 335 U. S. 464.] Here, the differences between the classes are apparent and significant. On the one hand are those who have an existing or reasonably prospective employment or business relation. On the other are those who do not. The former have a cause of action for unjustified interference

with that employment or relation, because they have an immediate or existing interest which is affected to their detriment by the interference. The others do not have a cause of action because no such interest is affected and because, therefore, no injury or damage has been done them. To make the existence of a cause of action depend on whether some interest of the plaintiff has been injuriously affected by the conduct of the defendant, is not only proper classification; it is to apply to the instant situation the usual and universal criterion which distinguishes the moot or academic controversy from those of which courts will take cognizance.

Even if it be said that the facts bring petitioners within the class of those who have an existing or prospective interest, they have been deprived of no constitutional right by the decision below. We would then have only an erroneous application of a correct principle of law to the facts. Such error in a matter of local law is not a denial of equal protection. [*Worcester County Trust Co. v. Riley*, 302 U. S. 292, 299; *Milwaukee Elec. Ry. Co. v. Milwaukee, supra*, 252 U. S. at 105-106. See also, the cases last cited Point II, *First, supra.*]

Fifth: A major fallacy in petitioners' argument is that they are arguing a question which was not and did not have to be decided. [See, *Preliminary Statement*, par. *Second, supra.*] Another fallacy is that their argument necessarily assumes that a policy of anti-monopoly and restricted freedom of choice of one's employees has been made a constitutional absolute which everyone—private citizen as well as the state—must adopt and enforce. All this has been set forth at length above. An additional word or two may be said about some of petitioners' specific contentions.

The right to pursue a calling is, of course, one of the liberties protected by the Fourteenth Amendment against arbitrary *state* action. But that right does not impose upon anyone else, with an equal right to pursue his private business, the duty to employ one whose calling requires employment by another. The right to work is not the right to work for any specific employer. [*Cf.*, *McAuliffe v. Mayor,* 155 Mass. 216, 29 N. E. 516, Holmes, J., writing for the court. *Cf.*, also the position of *amicus curiae* in the case at bar with that taken by it a short time ago in protesting the discharge of an actress. At that time, as quoted in one of its own reports (Miller, The Judges and the Judged, p. 18), the A.C.L.U. said that the actress had "no constitutional right to appear" in a given dramatic production.]

The short of the matter is that conduct of the sort here complained of has not been made unlawful by the state. That it could have been made unlawful we need not deny. No doubt some, perhaps many, persons believe, as a matter of policy, that it should be. Petitioners' argument is nothing but a marshaling of reasons supporting such a policy. But the choice of policy was and is a matter for the appropriate department of the state government. It is not for the Federal courts to make or unmake the state's policy in this regard. Nor has the Congress—assuming it had the requisite power [but see, *Civil Rights Cases, supra,* 109 U. S. 3]—attempted to do so. The Civil Rights Act [18 U. S. C., Sec. 241] certainly does not. It is applicable solely to rights and privileges created and secured by the constitution against

private interference; not to those, such as Fourteenth Amendment rights, which are constitutionally secured only against state interference. [*United States v. Williams*, 341 U. S. 70, 77-78; *United States v. Cruickshank*, 92 U. S. 542, 551-555; *Hodges v. United States*, 203 U. S. 1, 14-20.]

No doubt the self-incrimination privilege secured by the Fifth Amendment is safe against restrictions or encroachments by the states or even by the Federal government. But private reactions which resort to that privilege may induce are quite another matter. The constitution secures to an individual free use of the privilege, in order that criminal charges against him shall be proved by evidence other than his own. [See, *Quinn v. United States*, 349 U. S. 155, 161-162.] It does not, and government need not, attempt to secure him against social disfavor or economic disadvantage which its use may produce. [See, *Ullman v. United States*, 350 U. S. 422, 430-431, 454.] Here, again, it may well be within the range of permissible state or Federal policy to attempt to protect against those practical and private consequences. As yet, the policy-making branches of government have not seen fit to do so.

Sixth: The foregoing criticism is equally applicable to the brief of *amicus curiae*. An additional appropriate comment upon that brief is that it is wholly irrelevant. It consists, in part, of a discussion of a question—*i.e.*, applicability of the guaranty of free speech—which even the petitioners do not seek to raise. It is not the office of an *amicus curiae* to inject new or different questions

into a case. [*Moffatt Tunnel Imp. Dist. v. Denver & S. L. Ry.* (10 Cir.), 45 F. 2d 715, 722, *cert. den.* 283 U. S. 837.] For the remainder, the brief is merely a melange of isolated extracts from various published articles purporting, mostly by hearsay, to relate facts as to the operation of a so-called "blacklist" in the motion picture industry. We assume, however, that petitioners have pleaded all of the relevant facts applicable to their situation. [See, *Faulkner v. California Toll-Bridge Auth.*, *supra*, 40 Cal. 2d at 328, 253 P. 2d at 666.] We assume further that the cause will be decided here, as it was below, on the facts in the record.

III.

Petitioners Invoke the Fourteenth Amendment to Proscribe Private Conduct, Whereas the Amendment Is Applicable Only to State Action. Thus, No Proper Question Under the Constitution Is Presented.

Axiomatically, the guaranties of the Fourteenth Amendment protect only against state action, not private conduct. [*Shelley v. Kramer*, *supra*, 334 U. S. at 13; *Civil Rights Cases*, *supra*, 109 U. S. at 10-11.] No state action is involved in the instant case. The entire complaint of petitioners—their argument as well as that of *amicus curiae*—rests on the asserted discriminatory nature of, and the economic consequences flowing from, respondents' voluntary adherence to a private agreement.

But, there is a wide gap, which petitioners and *amicus curiae* fail to bridge, between voluntary adherence to a

private agreement and the coercive enforcement of it by the state.[13] The Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." [*Shelley v. Kramer, supra,* 334 U. S. at 13.] ". . . So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. . . ." [*Ibid.* See, also, *Barrows v. Jackson,* 346 U. S. 249, 253 and, compare, *Hughes v. Superior Court, supra,* 339 U. S. at 468-469.] At bar the state has not enforced the alleged wrongful agreement, compelled adherence to it, or imposed sanctions for a failure to perform it. It simply has not acted to make execution of or voluntary adherence to such agreements unlawful. [*Cf., Shelley v. Kramer, supra,* 334 U. S. at 19.] It follows that there is not involved in this case any *state* action infringing any constitutional right to work or abridging freedom of speech or curtailing the self-incrimination privilege. For that matter, there is not involved any state action whatever—and it is only in respect of such action that the Fourteenth Amendment may be invoked.

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[13]The decisions upon which petitioners and *amicus curiae* mainly rely were all concerned with direct and affirmative action by the state. [See, *e.g., Takahashi v. Fish & Game Commission,* 334 U. S. 410 (statute prohibiting fishing licenses to persons ineligible to citizenship); *Truax v. Raich,* 239 U. S. 33 (state constitutional provision requiring employment of large proportion of native-born citizens); *Smith v. Texas,* 233 U. S. 630 (statute fixing arbitrary requirement as condition of eligibility to act as train conductor).]

Conclusion.

No federal question was decided below. None was seasonably raised. The one which is now sought to be raised is not substantial, going, as it does, to the state's choice of competing policies rather than to any real limitation on the state's power; and involving only private conduct rather than state action. The petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVING M. WALKER,
HERMAN F. SELVIN,
Attorneys for Industry Respondents.

GUY RICHARDS CRUMP,
Attorney for Respondents Wood, Walter, Moulder, Doyle, Frasier, Velde, Kearney, Jackson, Potter, Russell and Wheeler.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

Objection to Motion of American Civil Liberties Union for Leave to File a Brief as Amicus Curiae.

IRVING M. WALKER,
210 West Seventh Street,
Los Angeles 14, California,

HERMAN F. SELVIN,
523 West Sixth Street,
Los Angeles 14, California,

Attorneys for Objecting Respondents.

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Respondents Loew's Incorporated, a corporation; Paramount Pictures, Inc., a corporation; Columbia Pictures Corporation, a corporation; R.K.O. Radio Pictures, Inc., a corporation; Warner Brothers Pictures, Inc., a corporation; Republic Productions, Inc., a corporation; Hal E. Roach Studio, Inc., a corporation; Twentieth Century-Fox Film Corporation, a corporation; Universal Pictures Company, Inc., a corporation; Warner Bros. Pictures Distribution Corp., a corporation; United States Pictures, Inc., a corporation; Stanley Kramer Productions, Inc., a corporation; Sol Lesser Productions, Inc., a corporation;

Association of Motion Picture Producers, Inc., a corporation; E B. Mannix, Dore Schary, Harry M. Warner, and Jack Warner, object to the motion of American Civil Liberties Union For Leave To File A Brief As Amicus Curiae.

The reason for withholding consent to the filing of such a brief is that the proposed *amicus curiae* seeks to enlarge the scope of the questions raised in the petition for writ of certiorari and to raise and argue questions not heretofore raised or argued by the parties.

1. Here the central issue, in the language of the petition for certiorari [pp. 22-23], was

> "whether affected persons . . . are without . . . recourse to the Constitution when the agreement by [a] monopolistic combination excludes from the industry all those who claim the privilege against self-incrimination guaranteed by the federal Constitution, or who, when named as Communists in [a] legislative inquiry, fail to voluntarily appear and answer all questions without invocation of their Constitutional privileges."

Neither in statement of question nor in argument did petitioners raise any question which would differentiate the position of the so-called "Committee" respondents from that of the other respondents. Rather, petitioners said, "The same federal question" was presented as to all. [Pet., p. 33.] Emphasis and reasoning were confined to the acts of all respondents as private or non-official persons. They were referred to as "this non-governmental combination" or "group" [Pet., pp. 24, 29]; as not being "law enforcement agencies" [Pet., p. 25]; and throughout, as the "employers."

2. Proposed *amicus curiae*, admitting that "petitioners' arguments have mainly dwelt on the activity of the industry respondents. . . ." [*Motion*, p. 3], seeks to raise the question of "the validity and constitutionality of the conduct of the Committee respondents. . . ." apparently as affected by their official positions. [*Motion*, p. 3.] Thus, it is necessarily sought to go beyond the question presented by petitioners and to review which alone certiorari presumably was granted.

3. Also sought to be raised is the question whether "the decision below discriminatorily refused to give petitioners the benefit of California law establishing that an exclusion from one's calling is a basis for a cause of action . . .". [*Motion*, p. 4.] That is a question nowhere raised or suggested in the petition for certiorari.

The motion for leave to file a brief as *amicus curiae* should be denied.

Respectfully submitted,

IRVING M. WALKER,
HERMAN F. SELVIN,
Attorneys for Objecting Respondents.

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BRIEF OF INDUSTRY RESPONDENTS.

IRVING M. WALKER,
210 West Seventh Street,
Los Angeles 13, California,

HERMAN F. SELVIN,
523 West Sixth Street,
Los Angeles 14, California,

Attorneys for Industry Respondents.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF OF INDUSTRY RESPONDENTS.

Preliminary Statement.

This case began—and throughout its course below it was treated by the State Courts—as one involving only this reasonably uncomplicated question: Does the complaint state a cause of action for tortious interference by the respondents with the business relations of the petitioners? At the last moment, after judgment had gone against petitioners in the trial court and had been affirmed by the District Court of Appeal solely upon this issue of State law, a tardy and desperate effort was made by petitioners to inject into the cause a question under the Fourteenth Amendment. [See, Jurisdiction, *infra*, pp. 3-8.]

Upon that flimsy foundation there has been erected by petitioners an argument nearly limitless in the range and variety of constitutional problems discussed. The argument is almost all irrelevant, for in preponderant bulk it goes to questions which are not properly here. They are questions which were not raised or decided below. They are questions for which no adequate record exists because no one deemed them in issue below. They are questions which are not within the scope of those presented in the petition for certiorari. They are, therefore, questions which need not and should not be decided on this record and in this cause.

So far as any constitutional issue under the Fourteenth Amendment is concerned—assuming it to be properly before this Court—the central question must be whether, in the private conduct complained of, there has been any "state action" in the meaning of that term in relation to the Amendment. That, in turn, is essentially a question of accommodating and delimiting the respective spheres and intests of the Federal and State governments in the regulation of private conduct. It is a question which touches upon a sensitive spot. As has been recognized, at least since the *Slaughter House Cases*, 16 Wall. 36 (1872) and the *Civil Rights Cases*, 109 U. S. 3 (1883) were decided, it is a question of a sort the answer to which profoundly affects the basic and essential nature of the Federalism we have known since the founding.

Having regard to the independent non-federal grounds upon which the judgment was based, and also to the manner in which and the time at which the Fourteenth Amendment question was raised below, it cannot be said that even that question is properly before this Court.

[Jurisdiction, *infra*, pp. 5-8; Point I, *infra*, pp. 30-37.] Certainly, however, no other constitutional question is here.

Jurisdiction.

This Court is without jurisdiction because the federal questions sought to be reviewed were not seasonably or properly raised in, and were not decided by, any of the State courts in which the instant cause was heard [28 U.S.C., §1257(3)]; and because the judgment rests on independent non-federal grounds adequate to sustain it.

The state of the record in that regard is as follows:

1. The complaint was not framed to raise or put in issue any right under the constitution or laws of the United States. It was plainly nothing more than an attempt to state a cause of action under the law of California for tortious or unjustified interference with business relations. [R. 35-36] It was so described by petitioners in the District Court of Appeal below. [See, their Opening Brief in that court, page 1.] No federal right was alleged; no provision of the federal constitution or of any federal law was pleaded or otherwise referred to. [See, pp. 10-13, *infra*; and, *cf.*, Br. 3-7.[1]]

2. A demurrer to the original complaint was sustained, with leave to amend, on the ground that the complaint did not state facts sufficient to constitute a cause of action. [R. 16-29] It is petitioners' theory, now, that a determination by a State court that the facts alleged gave them no cause of action was such action by the State in

[1]The Brief for Petitioners is referred to herein by the abbreviation "Br."

aid of respondents' private conduct as to make that conduct a denial by the State of due process and equal protection. [Br. 31-43; 87.] If that is so, then obviously the appropriate, and certainly the latest, time at which that constitutional question should have been raised was in the proceedings taken next after the rulings on respondents' demurrer which precipitated the question. [See, Point I, B, *infra*, pp. 32-34.] That was not done. Only an amended complaint, for all practical purposes identical with the original, was filed.[2] [R. 29-41, 76-77] Still absent was any suggestion that a federal right was being asserted or a federal constitutional question was being raised.

3. A demurrer to the amended complaint was sustained without leave to amend.[3] [R. 55] This, of course, made entry of a judgment of dismissal mandatory unless the ruling was reconsidered. [*Berri v. Superior Court*, 43 Cal. 2d 856, 860, 279 P. 2d 8, 11 (1955).] A motion to reconsider, on the ground that the ruling of no cause of action violated petitioners' rights under the Fourteenth Amendment, could have been made under California's practice. [*Bank of America v. Superior Court*, 20 Cal. 2d 697, 702, 128 P. 2d 357, 360 (1942); *Frantz v.*

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[2]The only differences between the two complaints were the deletion in the later of them of the words "blacklist" and "conspiracy" in a few places and the addition of the epithetical adverb "maliciously." [R. 44] In the California practice such epithetical pleading states no fact and raises no issue. [Cases cited, note 11, *infra*, p. 10.]

[3]A demurrer by the so-called committee respondents (who, as they did in the State courts, appear here separately and by other counsel) was sustained with leave to amend. [R. 55] Petitioners, however, were satisfied with their amended pleading. They declined to amend further and permitted judgment of dismissal as to those respondents to go against them. [R. 61-62]

Mallen, 204 Cal. 159, 161, 267 Pac. 314, 315 (1928); *De La Beckwith v. Superior Court*, 146 Cal. 496, 498, 499, 80 Pac. 717, 719 (1905).] No such motion, in fact no motion to reconsider on any ground whatever, was made. [R. 55-56]

4. An appeal from the judgment of dismissal was taken to the appropriate appellate court of the State. Petitioners filed elaborate briefs, aggregating 112 pages in length, in which they discussed many questions. But they did not assert any federal right as such. In the course of arguing other questions there were some occasional generalities about "constitutional rights."[4] These were merely rhetorical flourishes, serving no purpose other than to add a literary flavor to what was essentially an argument of a question of State law. [Cf., *Bowe v. Scott*, 233 U. S. 658, 664 (1914); *Mutual Life Ins. Co. v. McGrew*, *supra*, 188 U. S. at 311. See, Point I, B, *infra*, pp. 34-37.]

5. The District Court of Appeal affirmed the judgment of dismissal upon the sole ground that it did not appear from the complaint that the alleged exclusion of petitioners from employment in the motion picture industry was the result of the monopolistic and discriminatory combination among the defendants averred; so, it did not appear that petitioners have been injured or damaged by that combination; therefore they had no cause of action

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[4]The references in this connection upon which petitioners rely are collected at pages 12-13 of their brief here. Examination of them in the context in which they appeared below will bear out the characterization of them made in the footnoted text above. [See, Point I, B, *infra*, pp. 34-37.]

for any relief in respect of it.[5] [R. 69-77] There was no discussion in the opinion of the court of any federal right or of the federal constitution or any law passed in pursuance of it. No federal question of any kind was touched upon or decided in the opinion of the appellate court.[6] [R. 63-78.] Petitioners themselves say the holding was that they "had no standing to sue . . ." [Br. 87.]

6. A petition for rehearing in the District Court of Appeal was filed. In it, in addition to various non-federal grounds, petitioners made the contention that the Court's decision adverse to petitioners "merely because appellants [petitioners here] have not alleged the existence or probability of a contract of employment" denied them equal protection and due process "in violation of the equal protection and due process provisions of the fourteenth amendment." [*Pet. for Rehear.*, 10-13] This ground of the petition was opposed by respondents on the merits and, as well, because it came too late to be

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[5]In California a judgment based on the sustaining of a demurrer to the complaint will be affirmed if the demurrer was good on any ground made, regardless of the ground upon which the trial court may have sustained it. [*Moxley v. Title Ins. & Tr. Co.*, 27 Cal. 2d 457, 462, 165 P. 2d 15, 17 (1946).] It may also be noted that in California practice the memorandum opinion of a trial court cannot be used on appeal to impeach or vary its findings or judgment. [*De Cou v. Howell*, 190 Cal. 741, 751, 214 Pac. 444, 448 (1923); *Goldner v. Spencer*, 163 Cal. 317, 320, 125 Pac. 347, 348 (1912); *Williams v. Kinsey*, 74 Cal. App. 2d 583, 600, 601, 169 P. 2d 487, 498-499 (1946); *Lord v. Katz*, 54 Cal. App. 2d 363, 367, 128 P. 2d 907, 909 (1942).]

[6]This reinforces the conclusion that no such question was raised below. [*Bowe v. Scott, supra*, 233 U. S. at 664; *Bachtel v. Wilson*, 204 U. S. 36, 40 (1907).]

considered.[7] [*Answer to Petition for Rehear.*, 4-5] The order of the District Court of Appeal was: "Petition for rehearing denied." [R. 78] Such an order, in the circumstances here involved, cannot be taken as a decision of the federal question.[8]

7. A petition for hearing in the State Supreme Court after decision by the District Court of Appeal was next filed. Among a large number of other grounds for a hearing it was argued, under the heading "The Decision Below Creates An Unreasonable Classification," that due process and equal protection had been denied; but without explicit statement whether the asserted denial arose under the State or the United States constitution.[9] [*Pet. for Hear.*, 37-40.] The opposition to the petition was grounded, among others, upon the proposition that the fed-

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[7]A contention advanced for the first time in a petition for rehearing in a California appellate court comes too late to require consideration or decision of it by the court. That is a "settled rule" of practice in that State. [*Prince v. Hill*, 170 Cal. 192, 195, 149 Pac. 578, 580 (1915); *A. F. Estabrook Co. v. Ind. Acc. Comm.*, 177 Cal. 767, 771, 177 Pac. 848, 849 (1918); *Sanders v. Howard Park Co.*, 86 Cal. App. 2d 721, 723, 195 P. 2d 898, 899 (1948).] Neither will a contention not made in the trial court be considered on appeal. [*Imperial Valley E. Co. v. Globe Grain etc. Co.*, 187 Cal. 352, 359, 202 Pac. 129, 131-132 (1921); *Herbert v. Lankershim*, 9 Cal. 2d 409, 484, 71 P. 2d 220, 257 (1937); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. *supra*, at 309, and California cases there cited.]

[8]That order might have been based upon the untimeliness of the contention under the State practice, or upon the failure to make it in the trial court. This in itself would be an adequate state ground for the result in the State appellate court. [Point I, B, *infra*, pp. 30-37.]

[9]A contention of unconstitutional action which, as stated by the party making it, may be referrable to either the State or the federal constitution is insufficient. [*Oxley Stave Co. v. Butler County*, 166 U. S. 648 (1897); *Bowe v. Scott*, *supra*, 233 U. S. at 665; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67-68 (1928).]

eral question was raised too late. [*Ans. to Pet. for Hearing in 2d Civ. No. 20769,* 11-12.] The Supreme Court order was: "Appellants' petition for hearing Denied. Carter, J. is of the opinion that the petition should be granted." [R. 79.]

8. The record thus affirmatively shows:

a. None of the federal questions which petitioners now seek to have reviewed was raised or decided in the State court of first instance.

b. None of them was raised, and, even if raised, none of them was decided in the State District Court of Appeal when the cause was heard on the merits. Determination of them was not necessary to the decision actually made.

c. When raised in the petition for rehearing they did not embrace any question going beyond the equal protection or due process clauses of the Fourteenth Amendment.[10] [Pet. for Rehear., 10-13]

The record fails to show that, after the federal questions were belatedly raised, any one of the State courts involved entertained or decided them.

Restatement of Questions Presented.

1. Does this Court have jurisdiction to review a State court judgment when (a) that judgment rests on an independent non-federal ground adequate to support it, i.e., the absence of any showing of injury to the

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[10]There was not the slightest suggestion of any question under the privileges and immunities clause of the Fourteenth Amendment; or under the due process clause of the Fifth Amendment; or under the First Amendment; or under the supremacy clause, Article VI, clause 2.; Yet, questions directly involving all of these provisions are now argued at length in petitioners' brief.

petitioners from the allegedly wrongful conduct complained of; and, (b) the federal question sought to be reviewed was not raised or decided in the trial court, was not clearly or properly raised on appeal until the filing of a petition for rehearing in the State appellate court, and the record here does not show that the question was entertained or decided by that Court?

2. In an action for unjustified interference with business or employment relations, based upon an alleged agreement among all employers in a particular industry not to employ persons who invoked the self-incrimination privilege when questioned as witnesses before a committee of the Congress, the State court held that the plaintiffs had failed to show that their alleged inability to obtain employment in that industry was brought about by that agreement, so that their complaint failed to state a cause of action for any relief in respect of the employers' agreement. That holding was not based upon any statute of the State, or upon any determination that the agreement was lawful or constitutional, but upon the common law doctrine of interference with business relations. On these facts, did the *State* deprive the plaintiffs of property without due process of law or deny them equal protection of the laws within the meaning of the Fourteenth Amendment to the constitution of the United States?

3. When the only constitutional question presented in the petition for certiorari dealt solely with alleged rights under the due process and equal protection clauses of the Fourteenth Amendment and the supremacy clause, will this Court entertain and decide questions, raised in the petitioners' brief on the merits, arising under other provisions of the constitution?

Statement of the Case.

A. The Complaint.

1. The case was decided in the trial court on a demurrer to the amended complaint. It is, therefore, of the first importance that we know precisely what the well-pleaded facts in it were; and that we also know essential facts not pleaded.[11] Taking the first count relating to petitioner Wilson as typical of the other counts [R. 38] the complaint made these material allegations:

a. Petitioner is by profession a motion picture writer with more than five years experience as such. He has acquired a reputation for excellence of work and has won high esteem as such a writer. [R. 29]

b. The corporate respondents, except for certain trade associations formed by them, are in the business of producing and distributing motion pictures. They and the individual respondents (other than the so-called committee respondents) directly and indirectly control all motion picture production and distribution in the United States and all employment opportunities therein for actors, writers and others. [R. 29-34]

c. Prior to March 5, 1951 the respondents agreed with each other to refuse to employ and to exclude from employment in the motion picture industry all employees and persons seeking employment there-

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[11] In California a demurrer, like a motion to dismiss in the federal practice [*Collins v. Hardyman*, 341 U. S. 651, 652 (1951)], admits only the well-pleaded facts. It does not admit conclusional, argumentative or epithetical averments. [*Faulkner v. California Toll-Bridge Auth.*, 40 Cal. 2d 317, 328, 253 P. 2d 659, 667 (1953); *Callahan v. Broderick*, 124 Cal. 80, 82-83, 56 Pac. 782, 783 (1899); *Gosewich v. Doran*, 161 Cal. 511; 515-516, 119 Pac. 656, 658 (1911).]

in who, among other things, having been subpoenaed as witnesses before the Un-American Activities Committee of the House of Representatives refused, on constitutional grounds including the privilege against self-incrimination, to answer questions concerning their political affiliations, associations and beliefs; or who, having been named before the Committee as Communists, refused or failed to appear before the Committee and waive and surrender their constitutional rights and testify as to their political affiliations, associations and beliefs and those of their families, friends, associates and acquaintances.[12] [R. 35]

d. Respondents agreed that such persons would not be employed in the motion picture industry. Having so agreed, and intending to prevent them from being employed, respondents induced and persuaded each other, and other employers in the industry, not to employ such persons. As part of that agreement respondents have circulated and are circulating throughout the entire motion picture production, distribution and exhibition fields a list containing the names of such persons with the intent that they be not employed. [R. 35-36]

e. By this conduct the respondents "without justification or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the motion picture industry and to pursue their professions and oc-

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[12]The agreement was also alleged to extend to other categories of conduct; but no facts were alleged to show that any of the petitioners engaged in conduct coming within these categories. [See, R. 35]

cupations therein, and have prevented their employment therein." [R. 36]

f. On September 20, 1951 petitioner Wilson appeared before the Committee pursuant to subpoena. He there refused to answer certain questions put to him concerning his political affiliations, beliefs and associations.[13] Petitioner refused to answer those questions, "basing his refusal upon his constitutional rights, including the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. . . . ." [R. 36]

g. As a result, and by reason of the acts and agreement of respondents, petitioner has been and is now refused and excluded from employment in the motion picture industry; and will henceforth find it impossible to obtain employment in the profession to which he has devoted a major part of his life and energy. [R. 36]

h. The purpose of the agreement of the respondents, according to the belief of petitioners, was and

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[13]In California a fact which is the subject of judicial notice may be deemed a part of a complaint, even in the face of a contrary averment. [*Weil v. Barthel*, 45 Cal. 2d 835, 837, 291 P. 2d 30, 31 (1955); *Chavez v. Times-Mirror Co.*, 185 Cal. 20, 23, 195 Pac. 666, 668 (1921); *Hammell v. Britton*, 19 Cal. 2d 72, 75, 119 P. 2d 333, 334-335 (1941).] Accordingly, the State court took judicial notice of the proceedings of the Congressional Committee and thereby noticed that the questions put to petitioner related to whether he was or ever had been a member of the Communist Party. [R. 67-68] The notice which it took was merely of the proceedings before the Committee, i.e., of what had transpired there. It did not notice, indeed it could not have taken notice, that the assertions, answers or other statements there made were true or that they were proof of the facts asserted. [See, cases cited, note 20, *infra*, p. 19.] The petitioners opposed respondents' request for judicial notice [see their Reply Brief, 42-58, in the District Court of Appeal] and made no request, on their own account, that any fact be noticed.

is to limit, control and direct the political activities of their employees and to coerce and influence them by means of threat of discharge and loss of employment to refrain from adopting or following any course or line of political action not acceptable to the Committee; to limit employment in the motion picture industry to persons whose political beliefs are acceptable to the Committee; and to limit production of motion pictures to those the content of which is acceptable to the Committee.[14] [R. 37]

i. Compensatory damages of $1,250,000.00 and punitive damages of $1,000,000.00, were alleged in general terms. [R. 37]

j. Difficulty of ascertaining damages and irreparable injury were also alleged in general and conclusional language. [R. 37-38]

2. What the complaint did not allege is at least as important as what it did.[15] It did not allege:

a. That any of the petitioners was employed in the motion picture industry at the time the alleged agreement was made by the respondents; or at the time they appeared or were named before the Committee.

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[14]We summarize these allegations because petitioners place so much emphasis on them. They were, however, little if any more than averments of the "belief" of the petitioners. They were, therefore, argumentative and conclusional within the meaning of the California decisions [see, note 11, *supra*, p. 11]; and so, were not admitted by the demurrer.

[15]The presumption below, which the District Court of Appeal indulged [R. 74-75, 76-77], was that petitioners had pleaded the strongest case open to them. [*Faulkner v. California Toll-Bridge Author., supra*, 40 Cal. 2d at 328, 253 P. 2d at 666, and cases there cited.]

b. That any of them, at the times in question, had any reasonably probable or certain prospect of being so employed; or that, but for the acts of respondents complained of, they would have been employed.

c. That any of them, at or after they appeared or were named before the Committee, had requested or sought such employment; or that negotiations therefor were pending in any of their behalfs.[16]

d. That the list allegedly being circulated contained their names; or, if it did, that any statement in it was untruthful or a misrepresentation; or that it had been circulated to anyone not making a special request for it.[17]

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[16]At oral argument in the State appellate court it was conceded that "'it was not alleged 'that individual plaintiffs did apply for work and were denied the right to work.'" [R. 75]

[17]California has a so-called "blacklisting" statute. It is as follows [*Cal. Labor Code*, secs. 1050, 1053]:

§1050. Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after having paid off an employee voluntarily leaving such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor.

* * *

§1053. Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement, furnishes any mark, sign, or other means conveying information different from that expressed by words therein, such fact, or the fact that such statement or other means of furnishing information was given without a special request therefor is *prima facie* evidence of a violation of sections 1050 to 1053.

B. The Decision of the State Courts.

1. In the trial court, respondent's demurrer to the amended complaint was sustained without leave to amend. [R. 55, 56] The court's order in that regard was accompanied by a memorandum opinion [see, note 5, *supra*, p. 6] in which there was discussed only the question whether the respondents' alleged interference with petitioners' employment relations was shown to have been unprivileged or unjustified. No question arising under the Fourteenth Amendment was suggested, discussed or decided. [R. 44-54] Pursuant to that ruling, and some three weeks after it had been made, a judgment of dismissal was entered. [R. 55-56]

2. The District Court of Appeal affirmed the judgment. [R. 78] It did so on the sole ground that there was "an entire absence of factual allegation showing that any legally protected interest of plaintiffs has been interfered with. Neither an existing nor a prospective contract or business relationship is alleged. And there is nothing in the pleading from which it may be inferred that any prospective contract or business relationship has been interfered with by any wrongful acts of the defendants . . ." [R. 75-76] The steps in the Court's reasoning by which it arrived at that conclusion were these:

a. It was assumed that petitioners had stated their case as strongly as it was possible for them to do so. [R. 76]

b. The cause of action attempted to be alleged was "obviously one for wrongful interference with

future or prospective contract or business relations . . ."[13] [R. 69].

c. It was the general rule that to recover "for interference with the loss of a future or prospective contract or business relationship, it must appear that such contract or relationship would otherwise have been entered into . . ." [R. 70]

d. The complaint was devoid of any allegation of fact that any contract or relationship would have been entered into between any one of the petitioners and anyone in the motion picture industry but for the alleged agreement of the respondents. Reference was made to the matters which were not alleged, along lines to which we have already referred, *supra*, pages 13-14. From this absence of allegation, and from the fact that at most the complaint showed an employment and a termination of it some years before the respondents' agreement, the inference "necessarily is that the termination was the result of facts wholly disconnected from the agreement and that those facts, whatever they may have been, still are effective . . ." [R. 75]

e. It could not be inferred from the complaint that petitioners "have not obtained employment since they invoked their constitutional privilege solely because of that fact." [R. 75]

f. Consequently, there was an absence of factual allegation showing that any legally protected interest of petitioners had been interfered with by any

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[13]By making that statement the Court agreed with petitioners' own characterization of the nature of their complaint, as stated by them at page 1 of their Opening Brief in that Court

wrongful act of the respondents. The complaint, therefore, did not state a cause of action. [R. 75-76]

g. In view of this conclusion the Court did "not reach other points argued by counsel." [R. 77]

3. It is quite clear from the opinion of the District Court of Appeal that it did not reach, discuss or decide any question arising or thought to arise under the Fourteenth Amendment or any other provision of the federal constitution. It is also clear that the Court did not decide whether respondents alleged wrongful agreement was or was not unlawful, either under State law or by virtue of any provision of the constitution or laws of the United States. There was no occasion to decide any such question, assuming it to have been raised, since the Court had held that no legally protectible interest of the petitioners had been interfered with by that agreement.[19] [R. 77]

4. The proceedings in connection with petitioners' petition for rehearing and for a hearing in the State Supreme Court have already been adequately summarized. [Jurisdiction, *supra*, pp. 6-8.]

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[19]The District Court of Appeal did take judicial notice "of the proceedings and reports of the Committee on Un-American Activities"; and concluded that the questions put to petitioners by that Committee at the times alleged in the complaint did not relate to their political affiliations, associations or beliefs but concerned "their membership in a 'conspiratorial and revolutionary junta' . . ." [R. 67-68] Nothing in the decision of the Court, as petitioners now concede [Br. 13-14, 88-89], was made to depend on the matter so noticed. That *dictum* or statement in the opinion presents nothing for review. This Court reviews decisions, not statements in an opinion. [*Black v. Cutter Laboratories*, 351 U. S. 292, 297-298 (1956).]

C. Some Deficiencies in Petitioners' Statement of the Case.

Attention should be called to certain significant omissions from and unwarranted additions to the matters appearing in the record which have been made in Petitioners' "Statement of the Case." [Br., 3, *et seq.*] For example:

1. They state that the purpose of the combination complained of was to "refuse employment and to exclude from employment . . . all employees and persons seeking employment . . ." [Br. 4] They do not call attention to the fact that there was no allegation that any of them was, at the times here material, an "employee" or a "person seeking employment." As has been seen, it was the absence of any such allegation which largely influenced the result below. [Statement of the Case, *supra*, pp. 15-17.]

2. They do not refer to or summarize the allegation by which they characterized the nature or basis of their supposed cause of action. That allegation was this [R. 36]:

> ". . . That the defendants and each of them by this conduct wrongfully, maliciously and without jurisdiction or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the motion picture industry and to pursue their professions and occupations therein, and have prevented their employment therein."

3. The activities and proceedings of the House Committee on Un-American Activities which preceded or

followed the hearing at which petitioners appeared [Br. 7-10] were not noticed by any of the courts below; and no request that they be judicially noticed was ever made. The only notice taken—and this was opposed by petitioners, who argued that judicial notice did not extend so far [Reply Br. in the District Court of Appeal, 50-52]—was of the proceedings of the Committee, insofar as they related directly to the petitioners, at the time or times alleged in the complaint. [R. 36 (par. VI), 67-69]

4. The personal data with respect to the award-winning activities and the employment record of some of the petitioners [Br. 9-10; Br., App., 65-72] were not judicially noticed below. They could not have been except upon the premise that testimony or statements before the Committee established the truth of the matters there asserted without any right in the respondents to meet with other evidence.

5. The statement contained in the footnote at page 9 of Petitioners' Brief with respect to loss of employment is not supported by any reference to the record, or for that matter, to anything outside the record. It is patently a matter not the subject of judicial notice but one requiring allegation and proof in any case in which the fact may be relevant and material to some issue.[20]

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[20]With respect to the limits of judicial notice, see: *Mutual L. Ins. Co. v. McGrew*, *supra*, 188 U. S. at 312; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 189, 190 (1901); *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 787-788, 256 P. 2d 947, 954-955 (1953); *Popcorn Equipment Co. v. Page*, 92 Cal. App. 2d 448, 452-454, 201 P. 2d 647, 650-651 (1949).

Summary of the Argument.

Decision below was expressly and squarely based on only one ground. That was that the complaint failed to state a cause of action for tortious interference with business or employment relations because it was not alleged that, at the times of the alleged wrongful conduct of respondents, any of the petitioners were employed or seeking employment or that any of them had a reasonably certain prospect of obtaining employment in the motion picture industry. Rather, it appeared from the complaint that any loss of employment or failure to obtain it by petitioners was the result of causes other than the conduct complained of. Consequently, it did not appear that any legally protectible interest of petitioners had been invaded by that conduct. This was an independent non-federal ground, adequate to sustain the judgment. This Court, therefore, is without jurisdiction to determine the federal questions now sought to be raised. [Point I, A, *infra*, pp. 23-30.]

Another independent and adequate non-federal ground arises from the failure of petitioners to make their claim of federal right in the trial court at all, and from their failure to make it seasonably in the District Court of Appeal. California's practice requires that questions sought to be reviewed on appeal must have been raised in the trial court; and, also, that they cannot in any event be raised for the first time on appeal in a petition for rehearing. No state court in this case entertained or decided any of the federal questions now presented by

petitioners. The record here does not show that this absence of decision was not based on the State's procedural requirements just referred to. Furthermore, in the view of the case taken by the District Court of Appeal and upon which it grounded its decision, it was not necessary to reach or decide any of the federal questions, even assuming that they were seasonably and properly raised. [Point I, B, *infra*, pp. 30-37.]

Decision of a question of state law—and that is all that was decided below—raises no question of due process or equal protection. The Fourteenth Amendment does not guarantee that state court decisions of local law will be either correct or uniform. In any event, since the Fourteenth Amendment does not fasten upon the states any particular social or economic philosophy, the State here was free, so far as substantive due process was concerned, to adopt, alter or modify the common law doctrine of interference with business relations as it saw fit. It was also free, so far as equal protection was concerned, to classify upon the basis of differences between the classes reasonably related to the subject matter and purpose of the rule of law concerned. Differentiation, for purposes of applying the doctrine of interference with business relations, between those who do and those who do not have an existing or reasonable prospective business relationship, is entirely reasonable and proper. [Point I, C, *infra*, pp. 37-40.]

If it be assumed that questions under the due process and equal protection clauses are properly before this Court,

and if it be further assumed that it was necessarily decided below that the alleged combination or agreement of respondents was lawful, there is still no case for application of the Fourteenth Amendment. The provisions of that Amendment are restrictions upon the State, not upon private conduct or private agreements voluntarily made and voluntarily adhered to. When the State has not exerted its power to enforce or compel adherence to such private agreements, when all that it has done is to say, speaking through its courts, that a private agreement or some course of private conduct is not prohibited by any positive law or rule, there has not been such "State action" as is necessary to bring the Fourteenth Amendment into play. That is so because the opposite view would, in effect, make all private conduct which the State does not affirmatively prohibit subject to Fourteenth Amendment standards. Such a view would run counter to every decision of this Court on the subject. It would radically change the present balance between State and Federal jurisdiction in the regulation and control of private and local activities. It would make of the nation a centralized rather than a federal policy. It would, in short, completely change the fundamental structure and nature of the Union. [Point II, *infra*, pp. 40-52.]

The other federal questions argued by petitioner are not properly cognizable. They were not raised or decided below at any time. They are not within the scope of the questions presented in the petition for writ of certiorari. Either as a matter of want of jurisdiction or of non-conformity to this Court's practice, they should not be considered. [Point III, *infra*, pp. 52-55.]

ARGUMENT.

I.

This Court Is Without Jurisdiction Because the Judgment Is Based on Independent Non-federal Grounds Adequate to Sustain It.

There are in this case two independent non-federal grounds, either of which is adequate to sustain the judgment sought to be reviewed. The first of these is that judgment went against petitioners because, as a matter of state tort law and without regard to whether the combination or agreement of respondents was or was not in any way unlawful or unconstitutional, there had been no showing that the injury complained of resulted from or was brought about by that allegedly wrongful conduct. [Statement of the Case, *supra*, pp. 15-17.] The second is that the questions now asserted were not decided below because they had not been raised at such time and in such manner as, under the state practice, required the state courts to entertain or decide them. [Jurisdiction, *supra*, pp. 3-8.]

We know with complete certainty that the decision of the District Court of Appeal—properly the court to which certiorari was directed [*Hammerstein v. Superior Court*, 341 U. S. 491, 492 (1951).]—was expressly based on the first of these non-federal questions. [Statement of the Case, *supra*, pp. 15-17.] We know too that under the state practice the decision might have been based on the second of these questions [Jurisdiction, *supra*, pp. 3-8]; and we cannot tell from the record that it was *not* so based. Because of this explicit showing, and also because of the absence of any negation in the record of the possibility that the questions were not

decided because of the time and manner of their presentation below, the conclusion follows that this Court is without jurisdiction to decide them on their merits, whatever their appeal may be. [*Edelman v. California*, 344 U. S. 357, 358-359, 361-362 (1953).]

It has long been the rule of this Court—adhered to, it has been said, since the Court's foundation [*Herb v. Pitcairn*, 324 U. S. 117, 125 (1945)]—that "it will not review judgments of state courts that rest on adequate and independent state grounds . . ." [*Idem.* Other cases to this effect are cited in the margin.[21]] That rule applies even when, unlike the instant case, the state court in fact decided the federal question—for, to give this Court jurisdiction the federal question must have been *necessarily* decided. [*De Sassure v. Gaillard*, 127 U. S. 216, 232 (1888); *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54-55 (1934); *Rogers v. Jones*, 214 U. S. 196, 204 (1909); *Honeyman v. Hanan*, 300 U. S. 14, 18 (1937). See, *Williams v. Kaiser*, 323 U. S. 471, 477, 480 (1945); *Black v. Cutter Laboratories*, 351 U. S. 292, 298-299 (1956).]

And where the record is ambiguous or silent so that it is impossible to tell whether the judgment rests on the federal or the non-federal ground, it is enough to deprive this Court of jurisdiction that the judgment *might* have rested on the non-federal ground. Jurisdiction must be

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[21] *Woods v. Nierstheimer*, 328 U. S. 211, 214, 216 (1946); *White v. Ragen*, 324 U. S. 760, 766-767 (1945); *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U. S. 157, 164 (1917); *Holley v. Lawrence*, 317 U. S. 518 (1943); *New York ex rel. Doyle v. Atwell*, 261 U. S. 590, 592 (1923); *Cuyahoga Power Co. v. Northern Realty Co.*, 244 U. S. 300, 303 (1917); *Fox Film Corp. v. Muller*, 296 U. S. 207, 210 (1935).

shown affirmatively; it cannot rest in conjecture or debatable inference.[22] [*Stembridge v. Georgia*, 343 U. S. 541, 547-548 (1952); *Durley v. Mayo*, 351 U. S. 277, 281, 284-285 (1956); *Phyle v. Duffy*, 334 U. S. 431, 444 (1948); *Ellis v. Dixon*, 349 U. S. 458, 460 (1955); *Allen v. Arguimbau*, 198 U. S. 149, 154-155 (1905); *Walter A. Wood Co. v. Skinner*, 139 U. S. 293, 297 (1891); *Johnson v. Risk*, 137 U. S. 300, 307 (1890); *American Ry. Express Co. v. Kentucky*, 273 U. S. 269, 272 (1927).

Application of these well established principles to the facts at bar leads clearly to the conclusion that this Court is without jurisdiction.

A. The State Court Expressly Based Its Judgment on the Proposition That Even if the Conduct Complained of Was Unlawful Petitioners Were Entitled to No Relief in Respect of It Because It Had Not Injured Them. That Was a Non-Federal Ground, Fully Sustaining the Judgment and Independent of Any Federal Ground Going to Establish the Unlawfulness of the Conduct.

First: As has been seen, the explicit ground upon which the decision of the District Court of Appeal was rested concerned only a local question of tort law. Petitioners were denied relief—not because the combination or agreement of which they complained was held by that Court to be lawful or constitutional—but because they had failed to show that the combination, whatever its nature,

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[22]Compare, *Carroll v. United States*, 354 U. S. 394, 399 (1957), in which it was said:

> "It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute.

had so impinged upon any legally protectible interest of theirs as to have caused them any injury or damage. In short, the causal connection between the alleged harm to them, that is, loss of or failure to obtain employment, and the wrongful conduct complained of, was not shown. [Statement of the Case, *supra*, pp. 15-17.]

Plainly enough this was the decision of a question of state law. [*Cf., Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 589, 597-598 (1934); *Neblett v. Carpenter*, 305 U. S. 297, 302 (1938); *Parker v. McLain*, 237 U. S. 469, 472-473 (1915); *Sherman v. Grinnell*, 144 U. S. 198, 201-202 (1892).] As such it is beyond the power of this Court to review. [*American Ry. Express Co. v. Kentucky, supra*, 273 U. S. at 272-273; *Black v. Cutter Laboratories, supra*, 351 U. S. at 298. *Cf., Erie R. Co. v. Tompkins*, 304 U. S. 64, 78-80 (1938); *Ragan v. Merchants Transfer & W. Co.*, 337 U. S. 530, 533 (1949). See, also, cases cited, *supra*, p. 24.]

Just as plainly, it was a ground of decision broad enough to sustain the judgment of dismissal. It was also one which did not require, for its determination, decision of any federal question. Even if the alleged conduct of respondents were unlawful or unconstitutional in all of the respects now claimed by petitioners, decision of the issue of causal connection could have been no different. It would still have been true that respondents' conduct, *ex hypothesi* unlawful and unconstitutional, inflicted no harm upon the petitioners; as a consequence *they* had no civil cause of action in respect of it. Thus the non-federal ground is seen to be broad enough to sustain the judgment; and, as well, to be independent of any federal question. Any decision of the federal questions, even

if they had been decided, would not have been in any way necessary to the determination of state law which was made.

Necessarily, then, the principles governing this Court's jurisdiction [Point I, *supra*, pp. 23-25] apply here to establish want of jurisdiction to hear or decide the instant cause on the merits.

Second: That is so regardless of the correctness or incorrectness of the State court's decision as a matter of local law. ". . . whatever the grounds of that decision it is binding on [this Court] insofar as state law is concerned . . ." [*Williams v. Kaiser, supra,* 323 U. S. at 473.[23]]

On occasion the suggestion has been made that if decision of a state question is palpably so arbitrary or unfounded as to stamp it merely a device to evade federal review, determination of federal questions otherwise properly presented will not be forestalled. [See *e. g., Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., supra,* 243 U. S. at 164; *McCoy v. Shaw,* 277 U. S. 302, 303 (1928).] But that is a far different thing from review of a decision of a State court merely for the sake of revising the State court's judgment on a qeustion of State law. An adequate and independent non-federal ground, even though decided contrary to this Court's view of the correct decision on the subject, negates federal jurisdiction [See, *Bachtel v. Wilson,* 204 U. S.

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[23] To the same effect: *Smith v. O'Grady,* 312 U. S. 329, 330 (1941); *Neblett v. Carpenter, supra,* 305 U. S. at 302; *Bi-Metallic Inv. Co. v. Colorado,* 239 U. S. 441, 444 (1915); *Black v. Cutter Laboratories, supra,* 351 U. S. at 298, 299; *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 129 (1945).

36, 40 (1907); *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 335 (1908); *Radio Station WOW, Inc. v. Johnson, supra*, 326 U. S. at 129; *Klinger v. Missouri*, 13 Wall. 257, 263 (1871).]

In any event, the decision with which we are here concerned cannot properly be characterized as palpably arbitrary or unfounded. It was based upon a principle of the law of interference with business relations which had been previously announced and applied in California [*Campbell v. Reyburn*, 129 Cal. App. 2d 232, 234-235, 276 P. 2d 671, 672 (1954)]; and which had been followed in a number of other jurisdictions as well. [R. 70-74. The cases are collected in *Annotation* 9 A. L. R. 2d 228, 256-257. None to the contrary is cited there or by petitioners.] To be sure, no previous case involved a precisely similar factual situation. But, having regard to the case-law method of jurisdictions inheriting the common law tradition, it cannot be said that a court acts arbitrarily or without basis when it applies to a new set of facts the logically pertinent principle of an earlier decision. [Cf. *Wood v. Brady*, 150 U. S. 18, 22-23 (1893); *American Ry. Express Co. v. Kentucky, supra*, 273 U. S. at 273.]

The decision, too, is obviously consistent with a general principle that runs throughout the law—that wrong and injury must combine; so that the former without the latter creates no cause of action. [*Whipley v. McKune*, 12 Cal. 352, 357-358 (1859); *Atkins v. Gamble*, 42 Cal. 86, 106 (1871). Generally see, *Restatement of the Law, Torts*, (Amer. Law Instit. 1934), secs. 7, 848(c); Holmes, *Privilege, Malice and Intent*, 8 Harvard Law Rev. at 1 (1894)] Courts sit to determine concrete cases

and controversies, not abstract questions of law. To invoke the judicial power one must show that he has sustained or is in danger of sustaining immediately some direct injury as the result of the wrong complained of. [See, *Massachusetts v. Mellon*, 262 U. S. 477, 488 (1923); *Fairchild v. Hughes*, 258 U. S. 126, 129-130 (1922).] So, one not adversely affected in some recognized temporal interest by an alleged wrong is not usually in a position to bring about an adjudication of the question whether there has been in fact any wrong. [See, *MacLeod v. Fox West Coast T. Corp.*, 10 Cal. 2d 383, 386, 74 P. 2d 276, 278 (1937); *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 195, 238 P. 2d 670, 672 (1951); *Gillette v. Gillette*, 122 Cal. App. 640, 643, 10 P. 2d 760, 761 (1932).]

In this regard, the decision below is fairly analogous to the proposition that one not affected by state action claimed to be unconstitutional, cannot raise the question of its constitutionality; or, put somewhat differently, one may not ordinarily invoke or assert the constitutional rights of another. That doctrine is firmly imbedded in the decisions of this Court. [*Tileston v. Ullman*, 318 U. S. 44, 46 (1943) and cases there cited; *McCabe v. A. T. & S. F. Ry. Co.*, 235 U. S. 151, 162-164 (1914); *Liberty Warehouse Co. v. Burley T. G. Co-op. M. Assoc.*, 276 U. S. 71, 88 (1928).]

Disposition of the instant case in the court below on a theory consistent with general principles so widely recognized in the law can hardly be characterized as arbitrary or groundless, or as merely a device to evade decision of a federal question. [*Cf., White v. Ragen, supra*, 324 U. S. at 766; *Johnson v. Risk, supra*, 137 U. S. at 307-

309; *Allen v. Arguimbau, supra,* 198 U. S. at 155; *American Ry. Express Co. v. Kentucky, supra,* 273 U. S. at 273.]

B. The Failure to Raise the Federal Questions Below Seasonably and in Proper Form Is in Itself an Adequate Non-Federal Ground.

Well settled is the proposition that petitioners' "rights under the Federal Constitution must be pursued according to the procedural requirements" of the State and this Court is "bound by the record on which [the State] judgment was based . . ." [*Hedgebeth v. North Carolina,* 334 U. S. 806, 807 (1948).] Failure to decide a federal question because it was not properly presented in accordance with the State's procedural requirements is itself an adequate and independent non-federal ground for the judgment sought to be reviewed. [*Stembridge v. Georgia, supra,* 343 U. S. at 547; *Holley v. Lawrence,* 317 U. S. 518 (1943); *Edelman v. California, supra,* 344 U. S. at 358-359; *White v. Ragen, supra,* 324 U. S. at 766-767.] Just such a non-federal ground appears in the case at bar.

First: It is a settled rule of California practice that questions not raised in the trial court will not be reviewed on appeal. Neither will questions raised for the first time in a petition for rehearing in the appellate court. [Cases cited, note 7, *supra,* p. 7.]

There is absolutely nothing in the record here to show that any federal question was raised in the trial court. [Jurisdiction, *supra,* pp. 3-5.] It is not even contended by petitioners that one was there raised. That fact, by itself, justified the State appellate courts, as a matter of local practice, in not deciding any such question, assuming it to have been otherwise properly raised in those courts.

Furthermore, in view of the conclusion reached by the District Court of Appeal on the substantive question of state law to which it devoted its opinion, it was not necessary to decide any federal question. [Point I, A, *supra*, pp. 25-26.]

In either event, there is no basis for any review of federal questions in this Court; for the reasons, first, that failure to decide because of non-compliance with the state's procedural requirements is itself an adequate non-federal ground [cases cited, *supra*, p. 30]; and, second, a federal question *necessarily* decided below is an essential predicate of this Court's jurisdiction. [Cases cited, *supra*, p. 24.]

Second: It is clear, in view of the foregoing, "that the judgment *might* have rested upon a non-federal ground . . ." [*Stembridge v. Georgia*, *supra*, 343 U. S. at 547-548 (Court's italics); *Durley v. Mayo*, *supra*, 351 U. S. at 281, 285.] That appears plainly from the opinion of the District Court of Appeal, which rested judgment on a determination of local law and for that reason did not reach any other question. [R. 77]

The order of that Court denying the petition for rehearing was a bare denial, without expression of any reason or ground. [Jurisdiction, *supra*, p. 7.] Such an order cannot be taken as a decision of some federal ground presented in the petition, especially when, as here, there is a basis for holding that that presentation was not in compliance with a procedural requirement that the contention should have been sooner made. [*Forbes v. State Council*, 216 U. S. 396, 399 (1910); *Durley v. Mayo*, *supra*, 351 U. S. at 284-285; *Bailey v. Anderson*, 326 U. S. 203, 206-207 (1945); *Mutual Life Ins. Co. v.*

McGrew, supra, 188 U. S. at 311]. Exactly the same is true, of course, of the State Supreme Court's denial of the petition for hearing in that court. [Jurisdiction, *supra,* pp. 7-8.]

Third: It cannot reasonably be contended that the federal questions now argued by petitioners could not have been raised in the trial court. Their complaint here is that their constitutional rights were invaded below by the *judgment* of the District Court of Appeal. That complaint, in turn, rests, not on anything specifically decided, but on the result itself. [Br., 15-16] In other words, the argument is that the alleged invasion was accomplished by the determination, on whatever ground, that the facts alleged did not state a cause of action.

If that is true at all, it is equally true of the *trial court's* judgment.[24] Yet not a word was said in that court which even remotely suggested the existence of a constitutional question. However confident petitioners may have been

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[24]In arguing that a question under the Fourteenth Amendment was properly raised in the District Court of Appeal petitioners refer to page 7 of their Opening Brief in that Court. [Br., 12] We assume they refer to the heading appearing on that page reading as follows: (Italics ours)

> "*The Judgments below* Sustaining the Demurrers to the Complaint and Dismissing the Action Without Trial Deprived Appellants of Their Liberties and Properties Without Due Process of Law . . ."

They could just as easily have said as much in the trial court.

It may also be noted that to the extent that this heading purports to raise any constitutional question it is one which is not now being urged by petitioners; i.e., that *procedural* due process was denied because the complaint was dismissed "Without Trial." Of course, dismissal after a demurrer has been sustained, as here, after notice and opportunity to be heard, for the reason that the facts alleged, assuming them to be true, do not show a ground for relief as a matter of law, is not a denial of due process. [See, *Iowa Cent. Ry. Co. v. Iowa,* 160 U. S. 389, 393-399 (1896); *Ownbey v. Morgan,* 256 U. S. 94, 110-112 (1921).]

of their legal position when they commenced this action, they could not blandly or blindly exclude from their thinking all possibility of an adverse result in the trial court. The uncertainties of the law and of litigation are still to be reckoned with by any lawyer not wholly inexperienced or ingenuous.

In any event, when respondents filed their first demurrer the possibility that the facts alleged by petitioners might be held not to state a cause of action was not then beyond ordinary prescience. That possibility became a reality when the demurrer was sustained. Petitioners by then must have known that unless their complaint was amended in substantial particulars, judgment in the trial court *would* go against them. They made no such amendment. So, another demurrer was sustained, this time without leave to amend. That made inevitable the entry of a judgment against them unless the ruling on the demurrer was reconsidered. [Jurisdiction, *supra*, pp. 3-5; Statement of the Case, *supra*, p. 15.]

If the contention that such a judgment would deprive petitioners of constitutional rights were ever to be made the time—and the latest permissible time—to make it had arrived. The state practice provided a method by which the contention could have been raised in the trial court even at that late date. [Jurisdiction, *supra*, pp. 4-5.] Petitioners, however, did not avail themselves of it. They permitted judgment to go in accordance with the ruling on demurrer.

Their failure in this regard cannot be excused by any claim that the judgment of the trial court could not have been anticipated. At least during the time between the ruling on the second demurrer and the actual entry of the

judgment of dismissal (a period of over three weeks [R. 55]) there was nothing which had to be anticipated; the result, absent a motion to reconsider, was an accomplished and inevitable consequence of that ruling, plainly foreseeable without possession of any gift of prophecy. [See, *Herndon v. Georgia*, 295 U. S. 441, 444-446 (1935); *Johnson v. New York Life Ins. Co.*, 187 U. S. 491, 495 (1903).[25]]

Fourth: Actually, it is fair to say that on the record before this Court there is nothing to show that the federal questions now argued by petitioners were ever raised below prior to the petition for rehearing in the District Court of Appeal. As we have seen, they were not then entertained or decided. [Jurisdiction, *supra*, pp. 5-7; Point I, B, *supra*, pp. 30-32.] When that is so, nothing is better settled than the proposition that a federal question comes too late when raised for the first time in a petition for rehearing or in an application to the State's highest court to exercise its discretionary jurisdiction to review the case. [*Consolidated Turnpike v. Norfolk etc. Ry. Co.*, 228 U. S. 326, 334 (1913); *Bowe v. Scott, supra,*

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[25]In *Herndon* the constitutional question arose out of an alleged change by the State Supreme Court in the construction of a state statute. The question was first urged on a petition for rehearing in the State Supreme Court. A majority of this Court held the question should have been sooner raised because, while a motion for new trial was pending in the trial court, the State Supreme Court had rendered a decision foreshadowing the changed statutory construction. So, the defendant was "bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action on the original hearing in the court below . . . ." The case at bar is clearly a much stronger one for application of this rule. In *Johnson* it was held that a claim of impairment of the obligation of a contract, precipitated by the trial court's judgment, should have been raised "either on the motion for a new trial, or in the assignments of error filed in the Supreme Court of the State . . . ."

233 U. S. at 663; *Radio Station WOW, Inc. v. Johnson, supra,* 326 U. S. at 128; *Mergenthaler Linotype Co. v. Davis,* 251 U. S. 256, 258-259 (1919); *Herndon v. Georgia, supra,* 295 U. S. at 443; *Forbes v. State Council, supra,* 216 U. S. at 399; *Loeber v. Schroeder,* 149 U. S. 580, 585 (1893).]

Petitioners, of course, contend that they raised the questions from the beginning in their briefs in the District Court of Appeal. [Br., 10-11] To this contention there are several answers.

1. Even if raised, the questions were not decided and did not have to be decided. Jurisdiction here cannot be based upon such a state of the record. [Point I, B, *supra,* pp. 30-32.]

2. The briefs are not part of the record. A "claim of jurisdiction [cannot] be sustained by reference to briefs and statements which are not part of the record." [*Lynch v. New York, ex rel. Pierson, supra,* 293 U. S. at 54. To the same effect: *Live Oak Water Users' Assoc. v. Railroad Commission,* 269 U. S. 354, 357-358 (1926); *Harding v. Illinois,* 196 U. S. 78, 84 (1904); *Mutual Life Ins. Co. v. McGrew, supra,* 188 U. S. at 308, 311.]

3. The references in the briefs did not properly raise any question under the federal constitution, assuming the briefs to be part of the record. They were not made in support of any claim, standing on its own footing, that petitioners had been deprived by the State of California of any constitutional rights. Rather, they were advanced as reasons why the trial court had erred in holding that the burden to show want of justification or privilege for the alleged interference with business relations was on

the petitioners.[35] The District Court of Appeal, however, found it unnecessary to deal with the subject of justification at all and did not do so. [R. 77.] Accordingly, the arguments pro and con touching that subject—(and these made up the bulk of the briefs on both sides in the District Court of Appeal)—were not considered. Furthermore, a good many of the references in petitioners' briefs were of such generality and imprecision as not to amount to a tender of any *federal* constitutional issue in a form

[35]Thus, petitioners argued that the alleged combination could not be held *prima facie* privileged or justified; that the complaint sufficiently alleged want of justification anyway; and that the trial court had erred in dismissing their complaint without a trial on the facts going to this question. [Op. Br., 7, 21. (All references in this footnote are to the briefs filed by petitioners in the District Court of Appeal).] In support of that proposition they argued: Respondents' "monopolistic control of employment opportunities in the industry runs counter to the letter and spirit of state and federal laws . . . 18 U.S.C., Secs. 1, 2 [*sic*]. . . ." [Op. Br., 15]; that "it cannot be denied that the right to earn a living ranks high in our constitutional system. (Cal. Const. Art. I, Secs. 1, 13; U. S. Const. Amend. 14) . . ." so that "it cannot be reasonably argued . . . that the burden to prove lack of justification, if there was such a burden, was not met by the appellants here. The immunity granted to the respondents by the Court below operated to deprive appellants of their fundamental right to a trial of issues palpably requiring determination" [Op. Br., 18, 21]; that there was no power in a private combination to assume the powers of government and even government would not have power to compel waiver of constitutional rights as a condition of employment [Op. Br., 21-28]; the interest of respondents thought to provide the justification for their conduct was not as important as the constitutional privilege against self-incrimination [Op. Br., 28-32]; and respondents' purpose to control the political activities of their employees ran "counter to the letter and spirit of constitutional provisions which even governmental officials are forbidden to infringe . . ." [Op. Br., 36-42] They also argued that *respondents'* claim that they had a right to control the content of their own motion pictures as a matter of their right of free speech, was a strange perversion of the First Amendment. [Reply Br., 57-58]

adequate to require a court to take cognizance of it."[27] [*Cf., Thomas v. Iowa*, 209 U. S. 258, 263 (1908); *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67-68 (1928); *Ellis v. Dixon*, 349 U. S. 458, 462 (1955).]

C. No Federal Constitutional Question Arises From a Decision of State Law by a State Court Made in Accordance With Its Established Procedure.

First: No question under the Fourteenth Amendment arises from the ground upon which this case was decided below, even if we assume that this non-federal ground of decision was wholly erroneous. That decision was made, after notice and opportunity to petitioners to to be heard, in accordance with the State's ordinary and regular procedure. The "Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions . . . which did not involve any right secured by the Federal Constitution . . ." [*Tracy v. Ginzberg*, 205 U. S. 170, 178 (1907).] The opposite view would make every judgment of a state court reviewable here, which, as Mr. Justice Holmes said in the case just cited, would be "a result

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[27]For example: (All references are to petitioners' briefs in the District Court of Appeal): ". . . Respondents do not deny that the right to earn a living is a liberty protected by the Constitution . . ." [Reply Br., 37]; ". . . this would not mean that such artists had not been deprived of their right to earn a living by the coercive conduct of respondents." [Reply Br., 38]; ". . . monopolistic control of employment opportunities . . . runs counter to the letter and spirit of state and federal laws . . ." [Op. Br., 15]; ". . . the right to earn a living ranks high in our constitutional system. (. . . U. S. Const. Amend. 14) . . ." [Op. Br., 18]

not to be thought of . . ." [*Tracy v. Ginzberg, supra*, 205 U. S. at 178. To the same effect: *Gryger v. Burke*, 334 U. S. 728, 731 (1948).]

As a consequence, it is settled that a state court decision made in the regular course of judicial proceedings and based on state law does not deprive the losing party of due process or deny him equal protection; and that is so even if the decision is erroneous or inconsistent with earlier state decisions. [*Worcester County Tr. Co. v. Riley*, 302 U. S. 292, 299 (1937); *Milwaukee Electric Ry. Co. v. Milwaukee*, 252 U. S. 100, 106 (1920); *Central Land Co. v. Laidley*, 159 U. S. 103, 110-112 (1895); *Arrowsmith v. Harmoning*, 118 U. S. 194, 195-196 (1886); *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389, 393, 394 (1896); *American Ry. Express Co. v. Kentucky, supra*, 273 U. S. at 273; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., supra*, 243 U. S. at 166.]

Petitioners devote considerable space to arguing that the decision below was erroneous as a matter of state law. [Br. 25-31, 42-45, 93-106.] As the cases just cited amply show, such an argument presents nothing of which this Court may properly take cognizance.

Second: Even if the argument is cognizable here, it presents no substantial federal question. Certainly nothing in the Fourteenth Amendment *compels* a State either to recognize or to reject the common law doctrine of interference with business relations; or, having recognized it, to limit or expand it in any way. [*Cf., Ownbey v. Morgan*, 256 U. S. 94, 112 (1921).] In this regard, as in most others, the State is free to "alter, amend, or abolish the common law within its jurisdiction . . ." [*Liberty Warehouse Co. v. Burley T. G. Co-op. M.*

Assoc., supra, 276 U. S. at 89. To the same effect: *Silver v. Silver*, 280 U. S. 117, 122 (1929); *New York Cent. R. R. Co. v. White*, 243 U. S. 188, 198-200, 206 (1917); *Wilmington Min. Co. v. Fulton*, 205 U. S. 60, 74 (1907); *Munn v. Illinois*, 94 U. S. 113, 134 (1876).]

So, too, the State is "free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . ." [*Nebbia v. New York*, 291 U. S. 502, 537 (1934).] It cannot be assumed that, when this Court rejected what it called the "Lochner-Coppage-Adkins" philosophy [*Day-Brite Lighting v. Missouri*, 342 U. S. 421, 423], it did no more than to substitute the straitjacket of one economic philosophy for another. If, therefore, the State of California chooses to say that it will recognize a cause of action for interference with business relations but only as to those who have suffered interference in respect of an existing or reasonably prospective relation, there is nothing in the due process clause to stand in its way. [*Cf., Arizona Employers' Liability Cases*, 250 U. S. 400, 419-422 (1919).]

By the same token, there is nothing in the equal protection clause to proscribe such a policy. Equal protection of the laws is not denied by a classification based upon differences between the classes having a reasonable relation to the subject matter and purpose of the rule. (*Jones v. Union Guano Co.*, 264 U. S. 171, 181 (1924); *New York R. T. Co. v. New York*, 303 U. S. 573, 578 (1938); *Goesart v. Clearly*, 335 U. S. 464 (1948); *Railway Express Agency v. New York*, 336 U. S. 106 (1949).]

Here, the differences between the classes defined by the decision of the District Court of Appeal are apparent, pertinent and reasonable. On the one hand are those who

have an existing or reasonably prospective business or employment relation. On the other are those who do not. The former have a cause of action for unjustified interference with that relation, because they have an immediate or existing interest which is adversely affected by the interference. The others do not have a cause of action because they do not have such an interest; so, they have not been adversely affected in the same way as the first class. This demarcation between the classes is, as we have pointed out, pages 28-30, *supra*, closely akin to differentiations which are generally made in the law. It cannot properly be deemed an unreasonable classification.

II.

The State Did Not Enforce or Compel Adherence to the Private Agreement Here Complained of. Its Only Concern With the Matter Is That It Has Not Acted Affirmatively to Prohibit Such Agreements. Such Inaction Is Not State Action Within the Meaning of the Fourteenth Amendment.

For the purposes of this section of our argument we may assume, although the record does not bear out the assumption, that it was decided below that the combination or agreement allegedly entered into by the respondents was lawful under the law of California. Upon that assumption the question with respect to the Fourteenth Amendment is, obviously, whether in those circumstances the *State* has acted to deprive petitioners of due process of law or deny to them the equal protection of the laws. Consideration of the facts at bar in the light of history and precedent compel a negative answer to that question.

First: The "principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however, discriminatory or wrongful . . . So long as the purposes of those [discriminatory] agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated . . ." [*Shelley v. Kraemer*, 334 U. S. 1, 13 (1948).[28]] ". . . Individual invasion of individual rights is not the subject matter of the amendment . . ." [*Civil Rights Cases, supra*, 109 U. S. at 11.[29]]

The reasons for this view of the Fourteenth Amendment are well known. They rest on more than a literal reading of the words "No State" in the amendment. They are based upon a sensitive regard for the kind of nation which the constitution created and upon the conviction that the opposite view would result in such a

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[28]Among a considerable number of other decisions to this same general effect are the following: *Barrows v. Jackson*, 346 U. S. 249, 251, 253 (1953); *Collins v. Hardyman, supra*, 341 U. S. at 657-658; *Civil Rights Cases, supra*, 109 U. S. at 10-12; *United States v. Harris*, 106 U. S. 629, 638-639 (1882); *Virginia v. Rives*, 100 U. S. 313, 318 (1879); *Screws v. United States*, 325 U. S. 91, 108-109, 140 (1945); *Hurd v. Hodge*, 334 U. S. 24, 31-32 (1948).

[29]Of the same purport are: *United States v. Cruikshank*, 92 U. S. 542, 554 (1875); *Collins v. Hardyman, supra*, 341 U. S. at 658; *Gregoire v. Biddle*, 2 Cir., 177 F. 2d 579, 581 (1949); *Love v. Chandler*, 8 Cir., 124 F. 2d 785, 786 (1942); *Bottone v. Lindley*, 10 Cir., 170 F. 2d 705, 706-707 (1948) *cert. den.* 336 U. S. 944; *Campo v. Niemeyer*, 7 Cir., 182 F. 2d 115, 118 (1950). See, *Courant v. International Photographers*, 9 Cir., 176 F. 2d 1000, 1003 (1949) *cert. den.* 338 U. S. 943.]

centralization of federal power in matters generally thought to be of local concern as to overturn our federal system. That is a fact of history which this Court recognized in the first case decided on the merits under the Amendment [*Slaughter House Cases, supra,* 16 Wall. at 77-78] and to which it has adverted on a good many occasions since.[30]

Second: This long held view of the scope of the Amendment delimits the question here. That question is not whether a line between the spheres of State and Nation

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[30]For example:

". . . if the views of the minority [in the *Slaughter House Cases*] had prevailed it is easy to see how far the authority and independence of the States would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National Government. But we need not now inquire into the merits of the original dispute. This part at least of the *Slaughter-House Cases* has been steadily adhered to by this court . . ." [*Twining v. New Jersey,* 211 U. S. 78, 96 (1908).]

". . . This decision [*United States v. Harris, supra,* 106 U. S. 629] was in harmony with that of other important decisions during that period (referring, among others, to the *Slaughter House Cases, supra,* 16 Wall. 36, and the *Civil Rights Cases, supra,* 109 U. S. 3] by a Court, every member of which had been appointed by Presidents Lincoln, Grant, Hayes, Garfield or Arthur—all indoctrinated in the cause which produced the Fourteenth Amendment, but convinced that it was not to be used to centralize power so as to upset the federal system." [*Collins v. Hardyman, supra,* 341 U. S. at 657-658.]

". . . The Fourteenth Amendment did not alter the basic relations between the States and the national government. . . . It is only state action of a 'particular character' that is prohibited by the Fourteenth Amendment . . ." [*Screws v. United States, supra,* 325 U. S. 109.]

". . . It was not intended by the Fourteenth Amendment . . . that all matters formerly within the exclusive cognizance of the states should become matters of national cor ern." [*Snowden v. Hughes,* 321 U. S. 1, 11 (1944).]

See, also, *Dorsey v. Stuyvesant Town,* 299 N. Y. 512, 87 N. E. 2d 541 (1949) *cert. den.* 339 U. S. 981.

should be drawn at all; that has long since been settled.[31] It is whether the line should be drawn at a point which would bring under Federal control the conduct here complained of. To draw it at that point, however, would required an interpretation of the Amendment amounting to a reversal of the one which it has received from this Court since the *Slaughter House Cases*.

Upon the assumption which was made at the beginning of this section of our brief [p. 40, *supra*] all that was or could have been decided below was that no positive law or rule of decision in California made unlawful or actionable the combination or agreement of the respondents. To the extent that that agreement had any effectiveness at all it was because the parties to it voluntarily adhered to it. The State courts did not enforce—they have never been asked to enforce—that agreement. They did not compel or order any of the parties to adhere to it. They imposed no sanctions, civil or penal, upon any of the parties to compel or induce adherence to it. The real complaint of petitioners, therefore, is, and it can only be, that the State has done nothing to prohibit such voluntary private agreements.

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[31] Petitioners do not in so many words seek reconsideration or reversal of this line of decision. Acceptance of their argument, however, would necessarily bring about just that result. To find "state action" in the state's inaction here would push the limits of federal authority farther than any decision of this Court has yet taken them, as we shall show in a moment. At this point, however, we may suggest that the *Civil Rights Cases* and the others which have conformed to them are as much entitled to the benefit of *stare decisis* as was *United States v. Classic*, 313 U. S. 299 (1941) [see, *Screws v. United States, supra*, 325 U. S. at 112-113] or *Federal Baseball Club v. National League*, 259 U. S. 200 (1922). [See, *Toolson v. New York Yankees*, 346 U. S. 356 (1953).]

What the argument of petitioners comes down to, then, is that the State, by its *inaction,* has permitted such agreements to be voluntarily made and performed. If that is "state action" then all private conduct not prohibited by positive State law is state action. All private conduct not so prohibited is, in this sense, "permitted" by the state. Thus, it is plain—at least when resort to a State court for relief against such unprohibited private conduct has proved futile because of the very fact that there is no prohibition against it—that all private conduct becomes state action and, therefore, subject to the Fourteenth Amendment. That, to repeat Mr. Justice Holmes' phrase uttered in a not dissimilar context, is "a result not to be thought of . . ." [*Tracy v. Ginzberg, supra,* 205 U. S. at 178.] It is not to be thought of because it would for the first time introduce into the constitution the centralizing conception of the Fourteenth Amendment against which this Court and the nation generally have stood firm.[32]

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[32]It is not difficult to think of ordinary private activity, heretofore never considered to be of anything but local concern, which would be subject to Federal legislative and judicial control if petitioners' theory were law. For example, suppose that in a State having no prohibition against closed-shop contracts all of the employers in a given industry, not engaged in interstate commerce, agreed, and induced each other to agree, that they would employ only members in good standing of a certain union. Employees discharged for non-union membership and other persons refused employment for the same reason, would thus be effectively deprived of their "right to work" at their chosen callings. If such persons brought an action against the employers, seeking relief in respect of this "monopolistic" combination, and suffered a dismissal because no law of the state made such an agreement or combination unlawful, petitioners' theory of the Fourteenth Amendment would require a holding that in so deciding the State court had deprived the plaintiffs of due process and denied them equal protection. The same would be true of a person denied admission to a private social club because of his race, religion or economic status; or of

Third: The furthest limits in this regard to which this Court has been willing to go are fairly represented, we think, by *Shelley v. Kraemer, supra,* 334 U. S. 1, *Barrows v. Jackson, supra,* 346 U. S. 249, and *Marsh v. Alabama,* 326 U. S. 501 (1946).[33] None of them, however, goes far enough to support the position of petitioners at bar. There was in each of them affirmative action by the State, through its courts or its legislature, which had the effect of putting behind the private agreements or conduct involved the coercive power of the State through civil or penal sanctions. That is obviously quite a different matter from the inaction which is all that can

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one denied admission to a fraternal or other organization which restricts its membership to persons of a specified religion or country of origin. The number of such examples is limited only by the nearly infinite variety of private activity in which men engage. All that it would take to make State action out of such private conduct would be the commencement of a lawsuit in the State court and its ultimate dismissal for failure to state a cause of action. Of course, it no doubt would be found in many cases that the conduct was justified or reasonable, and, therefore, not a violation of the Amendment. But that is not the point. The point is that the power of ultimate decision would rest in the Federal judiciary; and, necessarily, in view of section 5 of the Amendment, the power of control and regulation would reside in the Congress.

[33] *Rice v. Sioux City Memorial Park Cemetery,* 348 U. S. 880 (1954) *affirming,* by an equally divided court, *Rice v. Sioux City Memorial Park Cemetery,* 245 Ia. 147, 60 N. W. 2d 110 (1953) is of little help. Because of that equal division in the first instance and the subsequent rehearing and dismissal of the writ of certiorari [*Rice v. Sioux City Memorial Park Cemetery,* 349 U. S. 70 (1955)], it cannot be taken as having settled the question one way or the other. The fate of that case in this Court does show, however, that the constitutional question with which we are concerned is one which should not be reached except upon a record inexorably calling for its decision. The case at bar is not such a case, for the reasons to which we have adverted at length. [Point I, *supra,* pp. 23-40.] In this connection, we may properly notice the traditional reluctance of this Court to reach constitutional problems of grave import when it is not absolutely necessary to do so. [See, *e.g., Collins v. Hardyman, supra,* 341 U. S. at 659.]

be charged to the State in the instant case. It is one thing for a court to hold only that no law of the State prohibits voluntary adherence to some private compact. It is another matter entirely for a court, in addition to so holding, to compel or coerce adherence to that compact by injunction, an award of damages, or criminal punishment.

Petitioners' main reliance on the issue of state action seems to be *Marsh v. Alabama, supra,* 326 U. S. 501. [Br. 16, 36-47] Whatever may be the sweep of some of the language appearing in the majority opinion in that case, the actual holding was carefully limited to a ground which conforms to conventional Fourteenth Amendment doctrine. It cannot be overlooked that in *Marsh* this Court was reviewing a judgment of conviction under a penal statute of the State of Alabama. That statute, as interpreted and applied by the State court, had the direct and necessary effect of putting behind the private conduct there complained of the whole coercive power of Alabama's criminal law. It was, therefore, much more than a case of state inaction; it was a case of affirmative and effective legislative action by the State directed toward restricting the defendant's freedom of speech and religion. That is made clear by the following excerpts from the majority opinion: [326 U. S. at 505, 508, 509. Italics ours.]

> ". . . For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, *enforceable by a state statute,* to abridge these freedoms.

". . . The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and *a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature* clearly violates the First and Fourteenth Amendments . . .

* * * * * * * * *

". . . the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the *enforcement* of such restraint *by the application of a state statute. In so far as the State has attempted to impose criminal punishment on appellant* for undertaking to distribute religious literature in a company town, *its* action cannot stand. . . ."

Fourth: Petitioners also present the theory that activities, of a private business which may be regulated by the State because it is "affected with a public interest," become in some way state action. [Br., 39-47] That theory was much more clearly spelled out in the historic dissent of Mr. Justice Harlan in the *Civil Rights Cases, supra,* 109 U. S. at 37-42, 57-59, in which he drew upon the discussion of the concept of business "affected with a public use" in *Munn v. Illinois, supra,* 94 U. S. 113. But a great deal has happened to that concept since 1876. However useful it may then have been to make palatable the unpleasant, even hated, fact of government regulation

of business, it has long since served its purpose.[34] Today all business, indeed, virtually all private conduct, may be regulated by the State in the public interest, regardless of whether it is or is not affected with a public use in the technical common law sense. [*Nebbia v. New York, supra,* 291 U. S. at 537; *Day-Brite Lighting v. Missouri, supra,* 342 U. S. at 423-424.] Consequently, if the power of regulation were to be made the criterion of state action, all such regulable conduct would meet the test. The argument adumbrated by petitioners is merely another way of urging adoption of that centralizing view of the Fourteenth Amendment which never, since the Amendment was adopted, has been able to command the approval of this Court.[35]

Fifth: While petitioners' attack on the judgment below as a denial of rights secured by the Fourteenth Amendment has taken a wide range it need not be answered line by line. Unless the matters of which they complain can be said to have been the product of some action by

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[34]It is not out of place to observe that the reasoning of Mr. Justice Field's dissents in *Munn v. Illinois, supra,* 94 U. S. at 136, 139-143, 145-147, and the *Slaughter House Cases, supra,* 16 Wall. at 88-89—on their face apparently nothing more than a vigorous defense of the right to pursue the common callings and to hold private property without interference or restraint from the State—supplied the materials from which was fashioned the now rejected Lochner-Coppage-Adkins philosophy, which so stringently confined the area of State legislative activity in matters of social and economic significance. A reversion to that philosophy, even though indirectly, coupled with that view of the scope of the Fourteenth Amendment which did not prevail in the *Civil Rights Cases,* would indeed reduce the States to mere subdivisions or provinces of the national government.

[35]Except, perhaps, during that period when the Lochner-Coppage-Adkins philosophy held the ascendancy with a majority of this Court.

the State the Fourteenth Amendment is inapplicable. For the most part, petitioners' argument simply assumes the disputed question in that regard; but their assumption cannot be upheld for the reasons already noted. [Point II, *supra*, pp. 40-47.] With the destruction of that assumption, their argument collapses.

Nevertheless, a few additional words may be said in respect of some of their specific contentions. For example, they assert at length and in varying phraseology that they were denied the right to work except at the price of surrendering constitutional rights. [Br., 21-45, 92-98] But that denial, as their own discussion shows, was the result of voluntary adherence to a voluntary private agreement. To the support of their position they cite a large number of decisions holding or recognizing the rule that while a State may exclude a foreign corporation entirely it cannot condition admission upon a denial or curtailment of constitutional rights. [For example, *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922); *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583 (1926).] We need not take issue with those decisions, although they have not always met with complete approbation. Manifestly they deal with a restriction on the action of a *State*. That is far different from a limitation upon private conduct which, even if arbitrary or discriminatory, does not come within the proscription of the Fourteenth Amendment. [*Shelley v. Kraemer*, *supra*, 334 U. S. at 13.] For the same reason, cases such as *Truax v. Raich*, 239 U. S. 33 (1915), *Takahashi v. Fish and Game Commission*, 334 U. S. 410 (1948), and the like, which deal with arbitrary restrictions on the right to work imposed by positive legislative enactment, are also beside the point.

Relying on pretty much the same line of decision treating of so-called "unconstitutional limitations" on the admission of foreign corporations, petitioners strenuously argue that they have been denied "access to courts of the state . . ." [Br., 33-36] It is impossible to understand that argument. The cases cited have nothing whatever to do with the proposition for which they are offered. Furthermore, petitioners had complete access to the courts. Their complaint was filed. Its sufficiency as a matter of law was carefully considered and determined after due notice to them and opportunity to be heard, at which hearing they appeared. They had the benefit of an appeal, which *they* took, and upon which they were fully heard. [R. 2, 29, 56 (fol. 153), 57, 63.] Surely, "access to the courts" means no more than this. Most certainly it does not mean that a suitor, defeated after a full and fair hearing in accordance with the State's "settled usages and established modes of procedure" [see, *Tracy v. Ginzberg, supra*, 205 U. S. at 178] has been denied that access simply because judgment went against him.

Petitioners assail the discussion in the opinion of the District Court of Appeal concerning judicial notice [Br. 87-92] and the effect of the facts so noticed on the applicability of certain sections of the California Labor Code. [Br. 104-106] Aside from the fact that this was wholly a matter of the state law, it is conceded that the decision below was not based on it. The contention presents nothing for review here. [See, note 19, *supra*, p. 17.]

They also attack the merits of the argument made by us below with respect to the matters establishing justification for the alleged interference with business relations. [Br. 106-115] Perhaps the Fourteenth Amendment prob-

lems which they see in that theory of defense might have arisen had the State court based its affirmance of the judgment of dismissal upon that ground. The question was never reached in the District Court of Appeal. [R. 77]. It did not have to be reached. We assume that this Court is not interested in rendering what could only be, in this regard, an advisory opinion upon an abstract or moot question.

Petitioners' most vigorous and vehement argument is reserved for their attack on the motives of the House Committee on Un-American Activities. [Br. 51-59, 68-80] This raises a question never before brought forward in the instant case.[36] The argument is akin to that made in *Watkins v. United States*, 354 U. S. 178, 199-200 (1957) —a case which, unlike the one at bar, necessarily and directly involved the legality of the Committee's procedures. The argument was there disposed of as follows:

> ". . . But a solution to our problem is not to be found in testing the motives of Committee members for this purpose [exposure for exposure's sake]. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."

The presence of some members and employees of the House Committee as respondents here does not make out

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[36]There is, therefore, no adequate record upon which to base any exploration of that question. Certainly more is needed for an informed decision than the fragmentary excerpts from the record of some hearings (with which petitioners had nothing to do) obviously carefully screened and selected to make a point. [See also, cases cited, note 20, *supra*, p. 19.] In that state of the record we do not think it necessary to extend an already overlong brief with an analysis, correction or supplementation of petitioners' materials, which, like their material, would have to be based on matters outside the record at bar.

a case of state action. They were not officers or agents of the State of California. As agents or agencies of the Federal Government it is not the Fourteenth but the Fifth Amendment which imposes any restrictions upon them. [Cf., *Corrigan v. Buckley*, 271 U. S. 323, 330 (1926); *Shelley v. Kraemer*, *supra*, 334 U. S. at 8-9; *Courant v. International Photographers*, *supra*, 176 F. 2d at 1001-1002, 1003.] No question under the due process clause of the Fifth Amendment has heretofore been raised in this case.[37]

III.

Questions Raised Which Are Outside the Scope of the Questions Presented by the Petition for Certiorari Should Not Be Considered.

Petitioners have discussed a number of other questions dealing with asserted denial of their right of free speech and association under the First Amendment [Br. 51-80], and of their right to appear as a witness before Committees of the Congress and there invoke the self-incrimination privilege [Br. 81-87.] These, too, are new questions in the cause. Furthermore, they are outside the scope of the questions presented in the petition for certiorari, as indeed are a number of other questions discussed.[38] Nevertheless, we shall discusse them briefly.

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[37]With respect to these respondents the only contention peculiar to them which petitioners raised below was that the doctrine of governmental immunity from liability for torts did not apply. [Opening Brief in District Court of Appeal, 42-44] That, too, was a question not decided because it was not necessary to decide it. [R. 77]

[38]Aside from one going to jurisdiction, the only question presented in the petition for certiorari was whether the dismissal of petitioners' complaint because of its failure to allege an existing or prospective employment "was contrary to law and the supremacy clause of Article VI of the Constitution, deprived petitioners of their liberty without due process of law and denied petitioners the equal protection of the laws, in violation of the equal protection

First: The fallacy in petitioners' First Amendment argument is the same one which vitiates their claim of denial of due process under the Fourteenth. The First Amendment, which is historically and literally a restriction only upon the national government [*Talton v. Mayes*, 163 U. S. 376, 382 (1896)], can be applied to the States only if the freedoms which it guarantees are part of the due process secured by the Fourteenth Amendment. The denial of these freedoms, as with any other right secured by the Fourteenth Amendment, must, therefore, be found in some action of the State. That vital element is wanting here. [Point II, *supra*, pp. 40-52.]

If there has been an interference with First Amendment freedoms shown in this case at all, it was not an interference by the State of California. An interference brought about by lawful, or even unlawful, private conduct does not bring the Fourteenth Amendment into play. [Compare, *Collins v. Hardyman*, *supra*, 341 U. S. 651. Also, the cases cited, notes 28, 29, *supra*, p. 41.]

Actually, petitioners' argument in this respect is no more than a statement of reasons which would justify a State, as a matter of policy, in prohibiting conduct of

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and due process provisions of the Fourteenth Amendment." [Pet., 3-4] General as this language may be it does not embrace such questions as whether rights under the First or Fifth Amendments have been violated; whether the Committee's motives or procedures were proper and, if not, whether that gave petitioners any cause of action; or whether the State courts correctly applied the decisional law of the State. [*Roth v. United States*, 354 U. S. 476, 490, n. 27 (1957), with which compare the order granting certiorari, *Roth v. United States*, 352 U. S. 964 (1957).] Customarily, this Court has limited its consideration to those questions presented by the petition for certiorari. [*Mazer v. Stein*, 347 U. S. 201, 208 (1954); *National Licorice Co. v. Nat. Lab. Rel. Bd.*, 309 U. S. 350, 357, n. 2 (1940); *Irvine v. California*, 347 U. S. 128, 129-130 (1954); *General Talk Pic. Corp. v. Western Electric Co.*, 304 U. S. 175, 177-178 (1938).]

the sort discussed. It does not, however, bear on the question whether the State of California has deprived these petitioners of any constitutional right secured to them.

Second: We need not here debate the question whether, notwithstanding the supremacy clause or the Fifth Amendment, a State may restrict or confine the self-incrimination privilege secured by the Fifth Amendment. The State of California has not attempted any such restriction; and nothing in the decision below put any approval upon such an attempt had it been tried. The Court below did not decide that the alleged combination, denying employment to those who invoked that privilege, was or was not lawful either under State law or Federal law. Decision went off on other grounds, making decision of the question to which petitioners address themselves quite unnecessary.[39] [Statement of the Case, *supra*, pp. 15-17.]

So far as the argument of petitioners depends on the due process clause of the Fifth Amendment, the answer is substantially the same as has been given in relation to the Fourteenth. [Point II, *supra*, pp. 40-48.] The Fifth Amendment does not create rights in one individual against another. It is directed against the action of the national government. [*Corrigan v. Buckley, supra*, 271

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[39]Actually the matter of the self-incrimination privilege was only a collateral matter below, involved in the question whether respondents' alleged interference with business was or was not justified in the technical meaning of "justification" in tort law. The question of justification *vel non* was not decided; and so there was no decision of any question under the Fifth Amendment or the supremacy clause in regard to the self-incrimination privilege. [Point II, *Fifth, supra*, pp. 50-51.]

U. S. at 330 (1926); *Courant v. International Photographers, supra,* 176 F. 2d at 1003.]

Third: Much of petitioners' argument is directed at what they conceive to be the error of the decision below as a matter of State law. [Br. 25-26, 27-31, 42-45, 93-106.] The answer to that argument has already been indicated and need not be repeated. [Point I, C, *supra,* pp. 37-40.]

Conclusion.

The writ of certiorari should be dismissed for want of jurisdiction. If, however, it is determined that jurisdiction of the merits exists, the judgment of the District Court of Appeal should be affirmed.

Respectfully submitted,

IRVING M. WALKER,

HERMAN F. SELVIN,

Attorneys for Industry Respondents.

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IN THE

Supreme Court of the United States

October Term, 1957
No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF OF RESPONDENTS DOYLE, JACKSON AND WHEELER.

GUY RICHARDS CRUMP,
458 South Spring Street,
Los Angeles 13, California,
Attorney for Respondents Doyle, Jackson and Wheeler.

HENRY W. LOW,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

October Term; 1957

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF OF RESPONDENTS DOYLE, JACKSON AND WHEELER.

Preliminary Statement Regarding Parties Respondent.

On the face of, and again on page one, of their Petition for Certiorari, petitioners have named the following eleven persons, *inter alia*, as respondents in this cause: John S. Wood, Francis E. Walter, Morgan M. Moulder, Clyde Doyle, James B. Frazier, Harold E. Velde, Barnard W. Kearney, Donald L. Jackson, Charles E. Potter, Louis J. Russell, and William Wheeler.

In the amended complaint filed in the trial court the first nine of said persons are identified as members of the United States House of Representatives Committee on Un-American Activities (referred to hereinafter as "Committee") and the latter two as Senior Investigator and an investigator, respectively, of the Committee [R. 34].

We respectfully call the Court's attention to the fact that only three of said eleven persons were parties to the judgment below, and hence respondents in this Court [R. 61, 77].

Two of said three persons, Clyde Doyle and Donald L. Jackson, are members of said Committee; the third, William Wheeler, is an investigator for the Committee.

This is the brief of those three respondents.

Through inadvertence, the Brief in Opposition to Petition for Certiorari and in Reply to Brief of *Amicus Curiae,* referred to counsel for these three respondents as counsel also for Messrs. Wood, Walter, Moulder, Frazier, Velde, Kearney, Potter and Russell as respondents, although they were not before the Court and not parties to the judgment in the state court.

Summary of Argument.

As these respondents adopt the argument in the brief of industry respondents insofar as applicable, they also adopt the summary of argument in said brief relevant thereto, and herein summarize only the separate arguments made in this brief.

The allegation in the amended complaint in the trial court that these respondents acted "both in their official capacity with reference to said . . . Committee . . . and individually in non-official capacities" does not state a cause of action against them in their official capacity and is not admitted by their demurrer in the trial court, where the acts which they are alleged to have committed appear on the face of the amended complaint and are of a character which a court will take judicial notice are not within the scope of their official duties.

Indeed, if a cause of action, valid in other respects, had been asserted against them in their official capacity it would be barred by the constitutional immunity conferred upon members of Congress.

This Court should not take judicial notice of reports of the Committee which relate to matters occurring before respondents became affiliated in any way with the Committee, to matters whose asserted probative value depends not merely upon what was said but upon the truth and correctness of the statements made, or to matters which are irrelevant to any issues before this Court.

The taking of judicial notice by the District Court of Appeal of Committee reports with reference to matters which played no part in the grounds of its decision presents no justiciable issue in this Court.

ARGUMENT.

I.

Adoption of Brief of Industry Respondents.

To avoid duplication these respondents adopt the brief of industry respondents insofar as applicable.

II.

Petitioners' Criticisms of the Committee Are Irrelevant.

After almost totally ignoring the Committee, including these three respondents, in the court below,[1] in this Court "Petitioners' most vigorous and vehement argument is reserved for their attack on the motives of the . . . Committee . . ." (Br. of Industry Resp., p. 51).

Much of pages 51-80 of "Brief of Petitioners" is devoted to a violent denunciation of the Committee, citing in support of this thesis various dissenting opinions in judicial decisions, articles in periodicals, statements of Congressmen, and other sources.

In so doing petitioners commit some of the very excesses with which they charge the Committee.

Petitioners charge that the Committee, in the course of its hearings, has investigated matters which exceed what petitioners allege to be the proper bounds of investigation (Br. of Pet. p. 54).

Yet in the course of their frenetic attack, petitioners cite miscellaneous sources from 1956 all the way back

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[1]In their Opening Brief in the District Court of Appeal petitioners devoted 36 pages of argument to the judgment based on the demurrer of industry respondents, and 2 pages, at the very end of their brief, to the judgment based on the demurrer of these three respondents (Supp. R, Op. Br. for Pl.-App. pp 7-42, 42-44].

to 1938, without making any distinction whatever between actions and statements attributed to the Committee years before any of the parties to the present controversy became members thereof, and actions and statements after that time.

Respondents Doyle and Jackson became members of the Committee in 1949. Of the seven other Committee members named as defendants in the amended complaint who are not respondents in this Court, John S. Wood became a member of the Committee in 1947, and the others in 1949 or 1951.

Yet petitioners recklessly cite statements of former Congressmen Dies (made in 1938), Rankin (made in 1945), Mundt (made in 1946), a law review article published in April, 1947, dissenting opinions in cases decided in 1947 and 1948, and Committee Reports made in 1948 —all on the theory that the statements about the Committee contained therein can somehow be held to bind the parties in this case.

In so doing, petitioners do not invoke the principle of guilt by association—on the contrary, they infer that there may be guilt without the necessity of any association, merely by virtue of the fact that respondents later became members and employees of a Committee whose former members petitioners charge with improprieties.

Petitioners cite *Watkins v. United States* (1957), 354 U. S. 178, no less than eleven times—more than any other authority (Br. of Pet. pp. 33, 44, 69, 71, 73, 76, 78, 82, 83, 85, 91). The essential holding in *Watkins* was that a witness could not be convicted of contempt for refusal to answer a question before the Committee where

the *pertinency* of the question to a proper subject of investigation was not made clear to him, at the time.

But petitioners' entire tirade is totally devoid of pertinency to this cause. In the *Watkins* case, decided last June, this Court made several criticisms of the Committee's activities, and we can only assume that petitioners' irrelevant charges constitute an attempt to identify this case in the mind of the Court with the criticisms expressed in the *Watkins* case.

The Committee is not on trial in this case and the amended complaint does not allege any wrongdoing by it.

It is there alleged that these respondents (together with the 17 other respondents, and the 30 other named defendants who are not respondents) agreed to refuse employment to and exclude from employment in the motion picture industry, (a) all employees and persons seeking employment who, in reliance on the Constitution of the United States including the Fifth Amendment thereto, refused to answer questions concerning their political affiliations, associations and beliefs; and (b) all employees and persons seeking employment who were named before the Committee as Communists and who refused or failed to appear and surrender their constitutional rights and privileges and testify fully disclosing their own political affiliations, associations and beliefs and those of their family, friends, associates and acquaintances [R. 35].

It is also alleged that said respondents and defendants agreed that such employees and other persons would not be employed in the motion picture industry [R. 35].

Two overt acts are charged, one general, the other specific, *i.e.* (1) inducing and persuading each other and other employers in the motion picture industry to desist

and refrain from employing, and to refuse employment to, all such employees and persons; (2) publishing and circulating a blacklist [R. 36].

The purposes of the agreement are alleged to be threefold:

(1) To limit control and direct the political activities of the employees of said respondents and defendants and to coerce and influence them by threats of discharge and loss of employment to refrain from adopting or following any course or line of political action and activity not acceptable to the Committee; (2) to limit employment in the motion picture industry to those persons whose political beliefs are acceptable to the Committee; (3) to limit the production of motion pictures by said industry to those the content of which is acceptable to the Committee [R. 37].

Only the first two of these purposes have to do with the petitioners. The industry might object to the third, or perhaps the public, but not petitioners.

It is clear that no actionable conduct or activities of the Committee are charged in these allegations. True, it is alleged that the respondents adopted and implemented standards set by the Committee—although it is not alleged what these standards are—but that does not constitute a charge of an actionable wrong on the part of the Committee. The respondents might have adopted as a basis for their action membership or nonmembership in the Screen Actors Guild, conformity or nonconformity with standards set by the NAACP, or a pro-segregation group, or the Knights of Columbus or a Masonic body, but surely there would be no liability on the part of any of those groups because their respec-

tive standards of membership or non-membership in their respective organizations was adopted by a group such as the respondents in this case as a basis of action. And, of course, the Committee, being a governmental agency, is not subject to a civil suit in the absence of a statute permitting it.

It follows that the attempt to put the Committee itself on trial has no justification in law; and the arguments in the Brief of Petitioners and excerpts from the record of the proceedings of the Committee and its reports have no place here.

III.

No Cause of Action Is Asserted Against Respondents in Their Official Capacity.

Petitioners inferentially justify their attacks on the Committee on the ground that it is alleged in the amended complaint that these three respondents "acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in unofficial capacities" [R. 8].

Petitioners state that respondents' demurrer admitted the allegation that the acts were performed in their official capacities (Br. of Pet. p. 116).

This is not so.

The courts have held that allegations in a pleading as to the legal capacity in which a defendant performed acts will be disregarded where either the pleading shows on its face that the acts were performed in a different capacity, or where the court may take judicial notice of that circumstance.

Thus in *Cochran v. Couzens* (D. C. Cir., 1930), 42 F. 2d 783, *cert. den.* 282 U. S. 874, an action for slander was brought against a Senator in a speech given by him in the Senate alleged to have been made "unofficially and not in the discharge of his official duties as a Senator of the United States."

In affirming the action of the trial court, sustaining the motion to dismiss, the appellate court said:

> "The averment that these words were spoken 'unofficially and not in the discharge of his official duties as a Senator' is a mere conclusion and entirely qualified by the averment that they were uttered in the course of a speech." (p. 784).

In *Cooper v. O'Connor* (D. C. Cir., 1938), 99 F. 2d 135, *cert. den.* 305 U. S. 643, the appellees were sued in their individual capacity; the declaration did not even reveal that they were officers of the United States.

On demurrer, the trial court took judicial notice both of the offices which they held and that the acts in question were within the scope of their official duties, and sustained the demurrer. The appellate court affirmed.

To the same effect is *Laughlin v. Rosenman* (D. C. Cir., 1947), 163 F. 2d 838, holding, in affirming the dismissal of the complaint, that where the facts alleged showed that the acts in question were done in the parties' official capacity "the application of the rule of immunity cannot be avoided by the allegation that the defendants are sued in their personal capacities." (p. 843.)

The law of California is in accord.

In *Griffin v. County of Colusa* (1941), 44 Cal. App. 2d 915, in affirming a judgment entered after the sustaining of a demurrer to the complaint, it was said:

> "Plaintiff relying upon the rule that all facts well pleaded are admitted as true upon demurrer, contends the allegation in the amended complaint 'that at all the times herein mentioned the County of Colusa . . . maintained . . . and conducted in a proprietary capacity, a county hospital, known as the Colusa Memorial Hospital', must be accepted as true.
>
> "This general rule of pleading, however, does not admit a conclusion of law, . . . or allegations contrary to facts of which a court may take judicial knowledge." (p. 918.)

The court then noted the allegations of the complaint concerning the persons to and circumstances under which hospitalization would be furnished, and concluded that the hospital in question was being conducted by the county in a governmental capacity and not in a proprietary capacity.

In *Walker v. City and County of San Francisco* (1950), 97 Cal. App. 2d 901, a suit against a municipality for the death of a fireman struck by a streetcar, the court, in affirming a judgment of dismissal entered after the sustaining of a demurrer to the complaint, said that an allegation that the municipality operated the fire department and streetcar line in the capacities of two separate entities would be disregarded as a mere conclusion where the court, by the exercise of judicial notice, knew that the allegation was untrue.[2]

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[2]Plaintiffs therefore were not entitled to bring a judicial action, their proper remedy being an administrative proceeding under the workmen's compensation laws.

See, also:

Chavez v. Times-Mirror Co. (1921), 185 Cal. 20, 23;

Mullan v. State (1896), 114 Cal. 578, 581-2;

Livermore v. Beal (1937), 18 Cal. App. 2d 535, 539-540 and cases cited;

Arnold v. Universal Oil Land Co. (1941), 45 Cal. App. 2d 522, 529.

In the present case, the acts with which respondents are charged are the entering into an agreement with persons and corporations in the motion picture industry to refuse employment to and exclude from employment in said industry certain persons; inducing employers in that industry not to employ certain persons; and publishing and circulating a blacklist in said industry to effectuate said objectives.

This Court may take judicial notice that such acts are no part of the official duties of Congressmen and employees of Congressional committees.

Petitioners really concede the point when they say:

> "The facts set forth in the complaint showed conduct far removed from official duty. It is certainly not within the scope of the jurisdiction of members of a legislative committee, or employees of such a committee, to conspire with private persons to deprive citizens of their right to work and to further the conspiracy by circulating blacklists and otherwise coercing employers in the industry." (Br. for Pet. p. 117.)

Indeed even in the District Court of Appeal, petitioners stated:

> "At this stage of the proceedings, their conduct was wholly outside the area of official conduct and

no issue of official immunity can arise at this point, nor has there been any such plea interposed. Certainly the suit herein seeks no relief because of any legislative action taken by respondents or because of any lawful conduct within the area of legislative inquiries" [Supp. R., Op. Br. of Pltf.-App. p. 44].

It necessarily follows that no cause of action is asserted against respondents in their official capacity.

IV.

No Cause of Action Could Be Asserted Against Respondents in Their Official Capacity.

The Constitution of the United States provides, with reference to members of Congress, that "for any speech or debate in either House, they shall not be questioned in any other place." (Art. I, Sec. 6).

This provision restates a principle of early English law, based on the public interest in having legislators free from all legal liability for their official actions (see *Tenney v. Brandhove* (1951), 341 U. S. 367, 372-376).

In *Kilbourn v. Thompson* (1881), 103 U. S. 168 this Court held that members of a House of Representatives Committee who instigated and voted for a resolution illegally adjudging plaintiff in contempt of the House, pursuant to which he was arrested, had no civil liability therefor.

The principle was also recognized in *Tenney v. Brandhove* (1951), 341 U. S. 367, construing a federal statute imposing civil liability upon any one who deprived another of Constitutional rights under color of state law, as impliedly exempting state legislators acting "in a field where legislators traditionally have power to act."

It has been recognized that the immunity extends to activities of members of Congressional committees. The *Tenney* case held that interrogation of a witness by a committee of the legislature was part of the "field where legislators traditionally have power to act." (See, in accord, *Yankwich: The Immunity of Congressional Speech —Its Origin, Meanings and Scope* (1951), 99 U. of Pa. L. Rev. 960 at 967.)

The immunity has been held to extend not only to liability in damages, but to injunctive relief as well.

Thus in *Nelson v. United States* (D. C. Cir., 1953), 208 F. 2d 505, *cert. den.*, 346 U. S. 827, it was said that "a court can no more enjoin a congressional committee from making an unconstitutional search than it can enjoin Congress from passing an unconstitutional bill." (p. 513).

As was said in *Barsky v United States* (D. C. Cir., 1947), 167 F. 2d 241, *cert. den.* 334 U. S. 843:

> "The remedy for unseemly conduct, if any, by Committees of Congress is in Congress, or in the people; it is political and not judicial." (p. 250).

The *Barsky* decision also referred to

> "the established rule of absolute immunity of governmental officials, Congressional and administrative from liability for damage done by their acts as such even though knowingly false or wrong" (p. 250).

None of the cases cited by petitioners at page 117 of their Brief are in any way inconsistent with the foregoing.

Three of the cases (*Ex parte Virginia* (1880), 100 U. S. 339; *Lewis v. Brautigam* (5 Cir., 1955), 227 F. 2d 124; and *Picking v. Penn. R.R. Co.* (3 Cir., 1945), 151 F. 2d 240) involved the liability of *state officers* un-

der *federal statutes* passed by Congress under authority of the Fourteenth Amendment.

The fourth case, *United States v. Bramblett* (1955), 348 U. S. 503, involved the criminal liability of a Congressman who falsely represented to the Disbursing Office of the House of Representatives that a certain woman was entitled to compensation as his employee. Obviously this act was remote from his official duties.

V.

This Court Should Not Take Judicial Notice of the Portions of the Committee's Reports and Proceedings Invoked by Petitioners.

On page 7 and following of their brief, petitioners impliedly ask this Court to take judicial notice of various portions of the proceedings of the Committee set forth in Appendix "B" of their brief.

It is respectfully submitted that none of the material therein contained is a proper subject of judicial notice in this cause.

About one-half of the quoted excerpts occurred in 1947 when none of these respondents were members or employees of the Committee. Indeed, of the nine Committee members and two Committee employees named as defendants in the trial court, only one, namely John S. Wood, was a member of or attached to the Committee at that time. The House of Representatives (unlike the Senate) is not a continuing body, but organizes as a new and separate body each biennium.

The gravamen of petitioners' amended complaint is an alleged agreement between all of the named defendants, made "on and prior to March, 1951," and continuously thereafter [R. 35]. Although the Complaint

does not specifically allege how long "prior to" March, 1951, said agreement was made, it does allege that "at all times herein mentioned" defendants Wood, Walter, Moulder, Doyle, Frazier, Velde, Kearney, Jackson and Potter were members of the Committee [R. 34]. Since Messrs. Doyle, Frazier, Kearney, Jackson and Potter did not become members of the Committee until January, 1951, the agreement in question was not, and could not have been, entered into before that date.

All of the Committee proceedings at which petitioners invoked the Fifth Amendment or were named as Communists appear to have occurred in 1951 and later years. (Supp. R. Resp. Br., Appx. A; Br. for Pet., Appx. B, pp. 59-60).

Petitioners allege that the relevancy of the 1947 hearings is that they manifest a "potential" conspiracy, which culminated in the agreement alleged in the amended complaint. (Br. for Pet. 7-8). This is tantamount to saying that the proceedings are referred to as tending to prove the truth of the allegation in the amended complaint that an agreement was formed. But since the formation of the agreement is not in issue in this proceeding, evidence in support of the allegation is irrelevant.

As to much of the proceedings referred to, both in 1947 and later, even the inferred probative value of the various statements depends upon the truth and accuracy of the statements, *i.e.*, statements regarding the purposes and objectives of the Committee and regarding the employment records of petitioners. But nothing in the statements themselves indicates whether or not they are true or false, correct or incorrect.

VI.

No Justiciable Question Is Presented by the Judicial Notice Taken of Proceedings Before the Committee by the District Court of Appeal.

Industry respondents, in their brief in the District Court of Appeal, requested that court to supplement petitioners' amended complaint by taking judicial notice of the Committee's official report of its proceedings at which certain appellants appeared (Supp. R, Resp. Br. p. 48).

In making this request, those respondents were careful to note that "Of course, notice is not taken for the purpose of establishing the truth of any of the matters testified to before the Committee" and to add that the purpose of taking notice was that the court might be aware "of the questions actually asked and the answers given by appellants" (Supp. R, Resp. Br. p. 48). In an appendix to said brief, respondents set forth the testimony of a number of appellants, given before said Committee, taken from the official report of proceedings before said committee (Supp. R, Resp. Br., Appx. A). The District Court of Appeal took judicial notice of said testimony [R. 67].

Without solicitation by any party, that court apparently also took judicial notice of other sources, including reports of said Committee, which it concluded demonstrated that the Communist party constituted a "conspiratorial and revolutionary junta"[3] and not a political affilia-

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[3]This language was quoted from the separate opinion of Mr. Justice Jackson in *American Communications Association v. Douds* (1950), 339 U. S. 382, 424.

tion, contrary to the allegations in the amended complaint [R. 68].

Petitioners correctly state that the court's remarks in this regard were "by way of dicta," and that "This construction of the complaint, however, was not any part of the court's basis for its affirmance of the judgments of dismissal" (Pet. for Cert. p. 10, fn. 1a).

Yet, later in the same document, petitioners allege that "this peripheral ruling raises substantial federal questions which this court should adjudicate" and urge that the use made of judicial notice was a denial of due process under the Fourteenth Amendment (Pet. for Cert. pp. 28-29).

In the Brief for Petitioners it is once more admitted that "This construction of the complaint, however, was not any part of the court's stated basis for its affirmance of the judgment of dismissal" (p. 14).

But later in the same Brief, petitioners, although again conceding that "It is also clear that the aforesaid holdings were not the grounds of the ruling of the court below" (p. 89), devote five pages to argument of the matter (pp. 87-92), stating as their reasons for so doing that "the opinion in these respects is . . . *erroneous* . . . and appears to have *motivated* to some degree the final decision" (p. 89; emphasis ours).

Since this Court does not sit to review either the correctness of dicta or the motives of judges the impropriety of petitioners' argument is apparent.

Conclusion.

The writ of certiorari should be dismissed for want of jurisdiction. If, however, it is determined that jurisdiction of the merits exists, the judgment of the District Court of Appeal should be affirmed.

Respectfully submitted,

GUY RICHARDS CRUMP,
Attorney for Respondents Doyle, Jackson and Wheeler.

HENRY W. LOW,
Of Counsel.

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IN THE

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October Term, 1957

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On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

Brief for Industry Respondents in Reply to Brief for Amicus Curiae.

IRVING M. WALKER,
210 West Seventh Street,
Los Angeles 13, California,

HERMAN F. SELVIN,
523 West Sixth Street,
Los Angeles 14, California,

Attorneys for Industry Respondents.

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On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

Brief for Industry Respondents in Reply to Brief for Amicus Curiae.

Preliminary Statement.

Amicus Curiae, we think, has taken a stand in this cause not open to one in its position. It has reached for questions to discuss which go beyond the case as made by the parties to it. Even one who has such a direct and justiciable interest in the subject-matter of a litigation as to entitle him to intervene as a party must generally accept the case as he finds it at the time of intervention. That is much truer of one who, like *amicus,* has no justi-

ciable interest whatever but only a scholarly or civic concern not distinguishable from that of the public at large.

No doubt the constitutional questions discussed by *amicus* are inviting; but whatever may be their appeal there must still be a record plainly and inescapably calling for their determination before they can be reached. [*Edelman v. California*, 344 U. S. 357, 361-362 (1953).] This is not such a record. [Resp. Br. 23-40.[1] Point III, *infra* pp. 17-20.] Nevertheless, we propose to meet *amicus* head-on; but in doing so we are not to be taken as receding in any way from the position that the questions which it seeks to inject into this cause are not properly before this Court.

Summary of the Argument.

Since the Fifth Amendment is a limitation upon action of the national government and does not create any rights in one individual as against another, it is necessary, in this suit for damages for the asserted violation of rights secured by that Amendment, to show some Federal governmental action producing the injury complained of. That action is thought by *amicus* to be found in the participation of the Congressional Committee respondents in the alleged wrongful combination to exclude petitioners from employment. But the allegation of that participation is too amorphous and equivocal to raise any question

[1] The briefs in this cause are referred to herein by these abbreviations:
Brief for Petitioners, "Pet. Br."
Brief of Industry Respondents, "Resp. Br."
Brief for Amicus Curiae, "A. C. Br."

in that regard. That allegation states that their participation was in both official and non-official capacities, but it does not specify what, if anything, wrongful was done by the committee respondents in their official capacities. The allegation, in fact, is wholly consistent with, and the ordinary presumptions of the regularity of official action require, the inference that their only official action was to hold a regular meeting of the committee. That meeting was not alleged or shown to have been improper or unlawful in any way.

Furthermore, some part, at least, of the participation of the committee respondents was alleged to have been in their individual and non-official capacities. That, of course, supplies no basis for a conclusion of governmental or official action. And, to the extent that they may have acted officially, their acts were not the *wrongful* acts complained of. Even if they were, which does not appear, they were protected by the immunity conferred by Article I, Section 6 of the United States Constitution. So, the joinder of these respondents as defendants, upon the allegations directed against them, did not introduce into the cause any element of Federal action.

With respect to the contention that there has been a refusal by the State of California to recognize the supremacy of the Federal Constitution insofar as it secures the privilege against self-incrimination, it is obvious that the State's duty in the premises is no broader or different from that of the Federal government. The claimed abridgement of the privilege was not the result of any

action of the State. It was the result of private reaction to invocation of the privilege—an off-shoot of the social opprobrium and disgrace which not infrequently attaches thereto. The Federal government may constitutionally deny the privilege entirely so long as it provides an immunity as broad as the legal consequences which might result from compulsory self-incrimination; but it need not, as a condition of such denial, protect against the privately induced social or economic consequences which may follow upon such incrimination. The State's duty under the supremacy clause can be no greater. California has not attempted to deny the privilege to petitioners or to deter them from exercising it. The allegation, in fact, is that they freely and effectively exercised it. The most that can be said is that the State Court did not take affirmative action against the social or economic consequences claimed to have ensued, from private action, after that exercise. The State was no more compelled to take such affirmative action than is the Federal government when it denies all resort to the privilege. So far as it is claimed that private interference with the privilege is prohibited by the Civil Rights Act [18 U. S. C. §241], this case is not within the statute because it is not alleged that petitioners are citizens. It is only citizens who are protected by Section 241.

In any event, these questions are not properly before this Court. They were not raised or decided below. They did not need to be decided below. They are not within the scope of the one constitutional question presented by the petition for certiorari.

ARGUMENT.

I.

The Complaint Fails to Show That Any Federal Governmental Action Was Involved in the Allegedly Wrongful Conduct Complained of. Consequently, It Raises No Question Under the Fifth Amendment.

A considerable part of the argument advanced by *amicus* is based on the proposition that the alleged participation of the so-called committee respondents in the acts complained of by petitioners establishes such Federal governmental action as to amount to a violation of rights secured by the Fifth Amendment.[2] [A. C. Br., 8-13.] It is, therefore, of the first importance that we know precisely what it is that is alleged against these respondents; especially since *amicus* has slurred over that vital point.

It is first alleged with respect to the committee defendants (eleven in number) that nine of them, naming them, were members of the "Committee on Un-American Activities, United States House of Representatives" and that the other two were, respectively, Senior Investigator and an Investigator of the Committee. [R. 34.] Next it is

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[2]We may defer for the moment consideration of whether this or any other question discussed by *amicus* is really involved in this cause; was seasonably or appropriately raised or decided below; or is within the scope of the questions presented in the petition for certiorari. The determined effort of *amicus* to get into this case some semblance of governmental activity—even though that effort requires going beyond the case made by petitioners—bespeaks the realization that without some such activity there is nothing in the case but a private controversy over a question of state law. [See Resp. Br. 10-17.]

averred that "with respect to the matters *hereinafter alleged* the [committee] defendants . . . acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities." [R. 34-35. Italics ours.]

What was "hereinafter alleged," insofar as it charged any activity on the part of the Committee defendants, was only this:

1. All of the defendants—industry as well as committee defendants—"agreed with each other to refuse employment to and exclude from employment in the motion picture industry all employees and persons seeking employment in the motion picture industry," who engaged in certain types of conduct. [R. 35-36.]

2. As part of that agreement all of the defendants are circulating a list containing the names of such employees and other persons. [R. 36.]

3. On given dates in 1951, various of the petitioners appeared, under subpoena, as witnesses before the Committee, at which time they refused, on grounds of self-incrimination among others, to answer certain questions concerning their political affiliations, beliefs and associations. [R. 36.]

No attempt whatever is made in the complaint to specify or differentiate between what was done by any of the committee defendants in their official capacities and what they did in their individual or non-official capacities. For all that appears in this record, their official action may have consisted only of sitting as a committee and asking

the questions which the petitioners refused to answer; and their alleged joinder in the exclusionary agreement complained of, was, in the language of the complaint, "individually in non-official capacities."[3] [R. 35.]

Petitioners have sought to supplement their allegation by reference to some comments made or questions asked by various committee members at hearings of the Committee on Un-American Activities. Most of these relate to hearings in which petitioners were not involved and are comments or questions of Congressmen other than those named as defendants in this case. [Pet. Br. App. B, 5, 7-19, 47-57.] From these fragments, culled from the record of hearings carried on over a period of several years, petitioners and *amicus* seek to draw the conclusion that the Committee members named at bar exerted official power to bring about the exclusionary agreement here involved.[4] [Pet. Br. 7-9; A. C. Br. 12-13.]

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[3]We know from the complaint that these defendants did *some* of the alleged acts in their individual or non-official capacities. Having regard to the deference properly due a co-ordinate branch of the national government and to the presumptions of regularity of official action which generally prevail until the contrary is shown [cases cited, *infra*, p. 10] the allocation of activity suggested in the text above would seem to be the only fair inference to be drawn from the imprecise and ambiguous allegation of "official" action. That inference is buttressed by the fact that the "official action" of these respondents is alleged to have been "with relation to said House Committee." [R. 35.]

[4]The comments or questions thus attributed to members of the committee who are named as defendants do not support the conclusion. Their general tenor, for the most part, was merely an inquiry as to whether certain writers, previously convicted of wilfully failing to answer pertinent questions before the committee, were, to the knowledge of a witness, working under assumed names. [Pet. Br. App. B., 47 (Kearney), 52 (Jackson)]; or whether a witness had knowingly employed Communists. [*Id.* 55 (Moulder)] Congressman Wood, speaking only for himself, went somewhat farther. [Pet. Br. App. B., 51.]

We may lay on one side a number of questions which arise from that effort at supplementation.[5] For the purposes of meeting *amicus* on the ground it has chosen we will assume, without conceding, that the matters so referred to are properly a part of the record at bar. Notwithstanding that assumption, the argument of *amicus* cannot command acceptance here.

First: The argument is not in any way based upon a claim that the State of California has acted to abridge any rights secured by the Fifth Amendment.[6] Rather, the argument is that Federal officials have so acted; and that their alleged joinder with private individuals in that regard subjects all of the participants to personal liability in damages. An essential premise of the argument, then, is *official* action by Federal officials. Without that, their acts, whatever they may have been, are only those of private individuals, against which the Fifth Amendment provides no protection. [*Corrigan v. Buckley*, 271 U. S. 323, 330 (1926); *Courant v. International Photographers*, 9 Cir., 176 F. 2d 1000, 1003 (1949), *cert den.* 338 U. S. 943. See *Shelley v. Kraemer*, 334 U. S. 1, 8-9 (1948); *Talton v. Mayes*, 163 U. S. 376, 382 (1896)].

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[5]For example: Are the matters referred to properly within the bounds of judicial notice? [See Resp. Br. 19, n. 20]. May the present Committee members, defendants here, be held *personally* liable in damages for utterances and acts of their predecessors or colleagues in office, especially when the defendants are not shown to have concurred in or adopted those utterances or acts? Do these utterances show anything more than an improper motive which cannot have the effect of vitiating the Committee's investigations or making its acts unlawful? [See *Watkins v. United States*, 354 U. S. 178, 199-200 (1957)].

[6]We come in a moment to the contention that the supremacy clause compelled the State to recognize a cause of action for the asserted abridgement of petitioner's privilege against self-incrimination. [Point II, *infra*, pp. 14-16.]

The allegation which it is claimed shows official action on the part of Federal officials is too ambiguous and uncertain to raise any question under the Fifth Amendment. It is of a kind with the allegation held, in *Ellis v. Dixon*, 349 U. S. 458, 462 (1955), to be insufficient to raise any question of due process or equal protection under the Fourteenth Amendment.[7]

The allegation here does not even point with clarity to any illegal or improper *official* conduct on the part of the committee respondents. As already noted, the allegation is entirely consistent with the view that the participation of the committee respondents in the claimed unlawful agreement was as individuals, not as Congressmen; and that their only alleged activity in an official capacity was to hold a committee hearing not alleged or otherwise shown to have been invalid or unlawful. [*Supra*, pp. 5-7.] In fact, since there is nothing to the contrary alleged, the only fair interpretation of this equivocal allegation is one which would make it consistent with regularity of official action.[8] There is nothing in this record to negate

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[7]In *Ellis* the question sought to be raised was whether refusal of the use of a public school building for a forum "On Peace and War" by a private organization was so discriminatory as to amount to a denial or deprivation of rights under the Fourteenth Amendment. The allegation in that regard was that other organizations "have been allowed to use Yonkers school buildings in the past 'for the purpose of public assembly and discussion' . . ." This Court, after pointing out that there was nothing to show that these other organizations were comparable to the complaining organization or to show what the general practice had been in permitting non-scholastic use of school buildings, said that the allegation to which we have referred was "too amorphous to permit adjudication of the constitutional issues asserted. . . ." [349 U. S. at 460-461, 462. Compare the cases cited, Resp. Br. 37.]

[8]It cannot be doubted that the Committee could have conducted a lawful investigation into Communist infiltration of the motion picture industry, and that in the course of that investigation it could have pertinently inquired into the membership of various individuals

the presumption of regularity with which all official action is clothed. [See, *Ex parte Mitsuye Endo,* 323 U. S. 283, 300 (1944); *Anniston Mfg. Co. v. Davis,* 301 U. S. 337, 357 (1937); *Bank of the United States v. Dandridge,* 12 Wheat. 64, 69-70 (1827).]

Of course, if the participation of the committee respondents in the activities claimed to have been unlawful was an individual or non-official participation, their position in the litigation and their liability, if any, to the petitioners would be no different from that of the non-official or industry respondents.

Second: When the attempt is made to bring to the aid of this ambiguous allegation the conduct of hearings by the Committee, another serious obstacle in the way of acceptance of the argument of *amicus* is raised. What is shown in that regard is only that some members of the Committee made some comments and asked some questions which are interpreted by *amicus* and petitioners as showing a purpose or motive to bring about exclusion from employment. But the Constitution of the United States, Article I, Section 6, expressly provides in that regard that "for any Speech or Debate in either House [the Senators and Representatives] shall not be questioned in any other place." When it is remembered that the effort here is primarily, if not solely, to impose a personal liability upon

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connected with the industry in the Communist Party. It has been so held with respect to the very investigation of 1947 upon which petitioners and *amicus* rely. [*Lawson v. United States,* App. D. C., 176 F. 2d 49, 51-52 (1949), *cert. den.* 339 U. S. 934. See, also, *Dennis v. United States,* App. D. C. 171 F. 2d 986, 987, 988 (1948) *aff'd* 339 U. S. 162, and cases there cited.

the respondents for damages alleged to amount to over $57,000,000.00, the applicability of that provision is clear.

The history of this clause of the Constitution and its great importance "in the presuppositions of our political history" are fully explained in this Court's opinion in *Tenney v. Brandhove,* 341 U. S. 367, 372-373 (1951). [See, also, *Kilbourn v. Thompson,* 103 U. S. 168, 201-205 (1880), holding that the immunity extends not alone to "Speech or Debate" but "to things generally done in a session of the House by one of its members in relation to the business before it."] The policy evidenced by the clause prompted this Court to hold in the *Tenney* case that the Civil Rights Act [42 U. S. C. §§ 1983, 1985 (3), formerly 8 U. S. C. §§ 43, 47 (3)] did not impose liability upon the members of a State legislative committee who were alleged to have conspired with an outsider to intimidate and silence the plaintiff from exercising his constitutional rights of free speech and of petition for redress of grievances. The case at bar, involving those who are precisely the persons to whom the privilege of immunity applies, is an even stronger one for application of the rationale of *Tenney.*

It is significant too that in *Tenney* it was plainly noted that the "privilege would be of little value if [the members of Congress] could be subjected to the cost and inconvenience and distractions of a trial *upon a conclusion of the pleader . . .*" [341 U. S. at 377. Italics ours.] At bar there has been built up an argument which would circumvent Congressional immunity upon an allegation which

does not even rise to the doubtful dignity of a "conclusion of the pleader"; for it is one which does not tell us whether the asserted wrongful acts were or were not official.

To state a cause of action against the Committee respondents it would have to appear that what they did was not within their constitutional immunity. To make that appear it would have to be shown that what they did was not done as Federal officials but as private individuals. And once that was shown it would be clear that for purposes of this case no claim of Federal governmental action could be postulated on their acts. Their presence in this case as defendants, therefore, does not make this a case presenting any question of violation of rights under the Fifth Amendment—for that Amendment is a limitation on the action of the national government. [Cases cited, *supra,* p. 8.] And, for the reasons given at length in our brief to the merits, it is not a case of which cognizance may be taken under the Fourteenth. [Resp. Br. 40-52] It is only a case, as below everyone thought and treated it to be, of alleged interference with business relations by private individuals, with no governmental action—State or Federal—of such a character involved as to raise any question under the Constitution of the United States. [Resp. Br., 1, 3-8, 10-17]

II.

The Supremacy Clause Is Not Applicable to Compel Recognition of a Cause of Action for Alleged Private Interference With the Self-Incrimination Privilege. While Congress May It Is Not Compelled to Act and Has Not Acted to Protect the Privilege Against Private Interference. So, There Is No Law of the United States in This Regard Which the States Must Obey.

First: Perhaps the main emphasis of *amicus* is upon the proposition that there has been shown an abridgement of the self-incrimination privilege secured by the Fifth Amendment; and that the supremacy clause [*U. S. Constitution,* Art. VI, Cl. 2] compels the State of California to provide a civil remedy in damages against those responsible for that abridgement [A. C. Br. 8-15]. The argument is not made to depend on the participation of government, State or Federal, in the asserted abridgement. It rests entirely on the private or individual action of which petitioners complain.[9]

No doubt the Congress, probably even the States, could constitutionally prohibit or punish private interference with the self-inerimination privilege. [Cf., *Ullmann v. United States,* 350 U. S. 422, 435-436 (1956); *United States v. Wheeler,* 254 U. S. 281, 299-300 (1920).] That is not the question here. The question is whether the Federal government has done so and, if not, whether it is *compelled* to do so. If it has not done so and is not com-

[9]For reasons already given, pages 5-7, 9-10, *supra,* the Committee respondents' alleged involvement in this abridgment must be taken as having occurred in their non-official capacities.

pelled to do so, the supremacy clause does not require the States to do any more.

The decisions of this Court make it clear that the Federal government is not required, as a condition of denying even all resort to the privilege, to protect against the private or practical consequences which compulsory self-incrimination may bring in its train. It is enough if the evil against which the privilege was designed to guard, *i. e.*, exposure to possible prosecution as the result of one's own testimony, is warded off. [*Ullmann v. United States, supra,* 350 U. S. at 430-431, 437-439; *Brown v. Walker,* 161 U. S. 591, 605-606 (1896); *Smith v. United States,* 337 U. S. 137, 146-147 (1949).]

These decisions plainly show that the purpose of the privilege is not to protect one from the social disgrace or humiliation or the private economic consequences which may follow from public reaction to the compulsory disclosure which denial of the privilege brings about. Because that is not its purpose, and notwithstanding that such consequences may be produced, the Federal government—as this Court long ago held [*Brown v. Walker, supra,* 161 U. S. 591] and only recently reaffirmed [*Ullmann v. United States, supra,* 350 U. S. 422]—need not protect against them even when it takes the privilege away entirely. Nothing in the supremacy clause makes the State's duty in this regard any broader or different.

The deterrent to exercise of the privilege which is seen by *amicus* in the instant case is solely the product of individual action, of private reaction to a refusal to deny

Communist Party membership. It is a fact that in this country such a refusal carries with it public opprobrium of the same sort which follows upon exposure of one as a Communist.[10]

Ullmann teaches that such a non-legal consequence of compelled disclosure of Communist membership does not invade the constitutional privilege, even when the Federal government compels the disclosure and thus is the cause of the consequence. No different or greater inroad upon the privilege is made by a similar non-legal consequence following invocation of it, especially when, as here, government has no part in the process. In either case the privilege has accomplished its purpose of preventing prosecution as the result of such compelled testimony—in the one case by granting immunity from such prosecution; in the other by permitting the privilege to be raised to prevent compelled testimony. In each case social opprobrium or economic detriment may ensue; but in neither case is government required to protect the witness against that consequence.

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[10]Disclosure that a person is a Communist "practically excommunicates him from society . . . ." [Douglas, J., dissenting, *Ullmann v. United States, supra*, 350 U. S. at 453]. It is indeed true that a "heated public feeling against Communists" exists "among many persons—probably a large majority . . ." [L. Hand, J., in *Dennis v. United States*, 2 Cir., 183 F. 2d 201, 226 (1950) *aff'd* 341 U. S. 494.]

It is uniformly held that an accusation that one is a Communist or a Communist sympathizer is libelous *per se*. [*Spanel v. Pegler*, 7 Cir., 160 F. 2d 619, 622 (1947); *Grant v. Reader's Digest Ass'n*, 2 Cir., 151 F. 2d 733, 734-735 (1945), *cert. den.* 326 U. S. 797. The cases are collected in *Annotation*, 171 A. L. R. 709.] The premises upon which decisions of this kind rest is the Court's judicial knowledge that such a charge exposes one to public scorn, hatred and obloquy.

This view of the matter does not leave the privilege at the mercy of the action or inaction of the States or even of individuals. The Congress has ample power, if it chooses to exercise it, to put such safeguards around the privilege as it deems necessary or wise to protect those who use it from private interference or economic detriment. [See *Ullmann v. United States, supra,* 350 U. S. at 435-436; *United States v. Wheeler, supra,* 254 U. S. at 299-300.]

Second: It is argued by *amicus* that Congress has already acted to prevent private interference with the privilege, citing 18 U. S. C. §241; so that California, it is contended, was bound to follow suit. [A. C. Br. 15-17] Whatever may be said for that reasoning in a case coming within the ambit of Section 241, it is quite irrelevant in the case at bar. Section 241 interdicts only conspiracy "to injure, oppress, threaten, or intimidate any *citizen* in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ." (Italics ours.) It is nowhere alleged in this record that any one of the petitioners was or is a citizen of the United States. That omission is fatal to any claim of right under Section 241.[11] [*Baldwin v. Franks,* 120 U. S. 678, 690-692 (1887). *Cf., United States v. Williams,* 341 U.S. 70, 77, 80, 81 (1951).] This is not, therefore, a case to which the supremacy clause applies; for the "law of the United States," to which California, it is claimed, refused obedience, was not applicable to the case before the State Court.

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[11]The absence of any allegation of that elementary but essential prerequisite of a cause of action under Section 241 also demonstrates that petitioners did not have in mind, and were not making, any such claim of right. The argument of *amicus* is simply an effort on its part to inject an issue into this case not contemplated by the parties.

III.

The Questions Argued by Amicus Are Not Properly Here. They Are, in Any Event, Beyond the Scope of the Questions Presented by the Petition for Writ of Certiorari.

For reasons which have been stated at length in our brief to the merits, this Court is without jurisdiction; and, in any event, the questions argued should not be considered because they are beyond the proper scope of the questions presented by the petition for certiorari. [Resp. Br. 3-8, 23-40, 52-55] An additional word or two may be ventured in that regard with respect to the specific questions argued by *amicus*.

First: The question as stated by petitioners both in the petition for certiorari, page 3, and their brief, page 3, is whether the "*judgments* of the state court dismissing petitioners' complaint" [italics ours] deprived the petitioners of rights under the Fourteenth Amendment. Manifestly, they had so to present the question since they are aware as anyone of the fact that the Fourteenth Amendment proscribes State, not individual, action. *Amicus*, however, goes beyond not only the confines of the Fourteenth Amendment by resorting to the Fifth, but treats the question as being whether the individual action of the respondents, having regard to the alleged participation of the Committee respondents, violated rights secured by the Fifth Amendment or by 18 U. S. C., §241.

To support its attempt to inject this quite different question into the case, *amicus* says that petitioners "have at all times stressed the infringement of their privilege against self-incrimination . . ." [A. C. Br., 5] It ignores, however, the context in which that "stressing" occurred. It was not as the basis of any claimed right under either

the Fifth Amendment or 18 U. S. C., §241, but as an answer to respondents' argument that the alleged exclusionary combination was justified as a reasonable means of protecting their interest in preserving their business enterprises from public disfavor. That answer was, among others, that petitioners' interest in the self-incrimination privilege outweighed respondents' interest in their business freedom, so that justification was not made out.

That was the problem which the trial court *discussed* in its opinion. [R. 46-50. See, also, Resp. Br. 36, note 26.] But even the trial court did not *decide* the question, for it said that ". . . . it is not necessary to go that far. It is necessary, as stated at the outset, that plaintiffs plead facts sufficient to show that the concert of agreement was not justified under the circumstances." [R. 50]

The District Court of Appeal did not reach or decide the question of justification at all; and did not even discuss it. [Resp. Br. 15-17] It affirmed the judgment on another ground as, under the State practice, it was entitled to do. [Resp. Br. p. 6, n. 5.]

Thus we see that neither court below decided any question of the sort which *amicus* raises, even if it be assumed that the question as it is now presented was before those courts. Nor did it have to be decided. The ground upon which the judgment was ultimately made to depend was independent of that question and was adequate to sustain the judgment. [Resp. Br. 25-30]

Second: Amicus says that this Court may decide for itself whether the complaint states a cause of action for

violation of Federal right. [A. C. Br. 4] No doubt that is true. But this Court cannot decide for itself whether the complaint states a cause of action under State law. Upon that issue the determination of the State Court is conclusive. [Cases cited, Resp. Br., 26.] And if that determination is adequate to sustain the judgment and independent of the asserted claim of Federal right, that is an end of the matter so far as review here is concerned. That is the case at bar. [Resp. Br. 25-30.]

It is obviously one thing to hold that review of a State Court's denial of a Federal right is not forestalled by local procedure or practice. It is quite another to hold that there may be review here of a State Court's determination of a local question. Furthermore, even in the first instance referred to there must have been a *denial* of the Federal right; and when, as here, that denial is claimed—at least by petitioners—to have been accomplished by a *judgment* of the State Court, it must appear that the Court actually decided the question or arbitrarily and groundlessly evaded decision of it. Neither of these necessary elements is found in the instant case.

Third: The State Court's ground of decision, *amicus* argues, "was not a tenable basis under State law . . ." [A. C. Br., 20.] That, of course, is a matter beyond this Court's constitutional power of review. [Resp. Br., 37-40.] It may be noted, however, that the California decisions upon which *amicus* depends are not inconsistent with the decision here. In those cases a cause of action for interference with business or contract relations was

recognized in respect of an *existing* relation. The absence of that relation or of any reasonable prospect of it prompted the contrary result in our case. [Resp. Br., 15-17.]

Conclusion.

The writ of certiorari should be dismissed for want of jurisdiction; or, alternatively, the judgment should be affirmed.

Respectfully submitted,

IRVING M. WALKER,
HERMAN F. SELVIN,
Attorneys for Industry Respondents.

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 33.

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF OF RESPONDENTS DOYLE, JACKSON, AND WHEELER IN REPLY TO BRIEF FOR AMICUS CURIAE.

GUY RICHARDS CRUMP,
458 South Spring Street,
Los Angeles 13, California,
Attorney for Respondents Doyle, Jackson, and Wheeler.

HENRY W. LOW,
Of Counsel.

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BRIEF OF RESPONDENTS DOYLE, JACKSON, AND WHEELER IN REPLY TO BRIEF FOR AMICUS CURIAE.

Summary of Argument.

Amicus contends that petitioners' amended complaint states a cause of action for violation of Constitutional rights.

Respondents[1] believe the question is not properly before this Court. Also, that no violation of the privilege against

[1]The term "respondents", as used herein, refers to the three respondents, Doyle, Jackson, and Wheeler, unless the context indicates otherwise.

self-incrimination is involved, both because the privilege protects solely against criminal prosecution, and also because no federal governmental action is alleged. Further, the state court has no duty, under the Constitution, to afford a civil remedy to persons whose privilege is violated by the federal government.

The fact that federal statutes make interference with certain Constitutional rights of certain persons under certain circumstances a criminal offense and provide for punishment of witnesses in contempt of Congress does not create a federal question in this case.

ARGUMENT.

Petitioners' Amended Complaint Does Not State a Cause of Action for Violation of Constitutional Rights. Nor Is the Question Properly Before This Court.

A. The Question Is Not Properly Before This Court.

Industry respondents, in their several briefs filed in this Court, have thoroughly demonstrated that the question of whether or not petitioners' amended complaint states a cause of action for violation of federal Constitutional rights is not properly before the Court. We concur in their argument.

To illustrate what *petitioners* thought their amended complaint involved, prior to the decision of the District Court of Appeal, we quote the opening paragraph of their Opening Brief in the District Court of Appeal:

> "The nature of the action herein is a claim by appellants against respondents for concerted and malicious interference with appellants' employment relations and right to work, without justification on the part of respondents; the intentional and malicious in-

ducement by respondents of each other and of third persons not to enter into or continue employment relations with appellants, without privilege to do so; and the publication and circulation by respondents of a list containing the names of appellants as a means of effectuating the aforesaid unlawful concert and inducement. The relief sought is money damages and an injunction" [Supp. R., Op. Br. for Pltf.-App. p. 1].

The small importance which petitioners attached to these three respondents, and their alleged conduct, while this cause was in the state courts, is further illustrated by the fact that although the trial court, in sustaining their demurrer to the amended complaint, gave petitioners 30 days within which to file a second amended complaint against them [R. 55], petitioners never bothered to do so.[2]

B. The Privilege Against Self-Incrimination Protects Only Against Criminal Prosecution, Not Against Loss of Employment.

Amicus claims that steps taken to interfere with petitioners' *employment* because of their assertion of the privilege against self-incrimination violates that portion of the Fifth Amendment.

Ullman v. United States (1956), 350 U. S. 422, not cited by *amicus*, is controlling on the point. In upholding the federal Immunity Act of 1954, this Court there said that the Court had often held that the privilege against self-incrimination protected a witness only against giving testimony which might expose him to criminal prosecution.

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[2]The demurrer of Industry Respondents was sustained *without* leave to amend [R. 55].

In support of its holding the Court quoted from *Hale v. Henkel* (1906), 201 U. S. 43. In that case it was said: "The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even to disgrace him but the line is drawn at testimony that may expose him to prosecution. . . .

"The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge." (Pp. 66-67.)

See, also:

8 *Wigmore on Evidence* (3rd Ed., 1940), p. 327.

None of the cases cited by *amicus* is to the contrary. *Bomar v. Keyes* (2d Cir., 1947), 162 F. 2d 136, and *Robeson v. Favelli* (S. D. N. Y., 1950), 94 Fed. Supp. 62 (A. C. Br. 9) both involved causes of action asserted under particular federal statutes[3] which *amicus* does not —and could not—claim are properly invokable here. *Slochower v. United States* (1956), 350 U. S. 551, concerns the application of the Fourteenth Amendment to the discharge of a state employee.

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[3]The *Bomar* case under then 8 U. S. C. 43, the *Robeson* case under then 8 U. S. C. 41, 43, 47(3) and 48. These statutes are now found in title 42, U. S. C., section 1981 *et seq.*

C. No Conduct by Respondents in Their Official Capacity Is Alleged. (If It Were, No Cause of Action Would Be Asserted Against Them Because of Their Constitutional Immunity.)

Amicus finds federal governmental action in the conduct of respondents, because it is alleged in petitioners' amended complaint that these respondents acted "both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities" [R. 35].

In our Brief on the merits, we demonstrated:

(1) That under both California and federal law, a demurrer does not admit an allegation as to the particular legal capacity in which acts are alleged to have been performed (which is a mere conclusion), where either the pleading shows on its face that the acts were not performed in that capacity, or a court may take judicial notice of that circumstance; and that this Court might take judicial notice that the acts which respondents are alleged to have committed were not acts which could be performed by them in their official capacities (pp. 8-11). See also Brief of Industry Respondents in reply to Brief of *Amicus Curiae*, pages 5-12.

This general principle has often been applied by this Court (see *Nortz v. United States* (1935), 294 U. S. 317, 324-325; *Pierce Oil Corp. v. City of Hope* (1919), 248 U. S. 498, 500; *Straus v. Foxcorth* (1913), 231 U. S. 162, 168).

(2) That petitioners, both in this Court and in the District Court of Appeal, inferentially conceded that respondents had *not* performed the acts in question in their official capacities (p. 11).

(3) That because of the legislative immunity conferred by Article I, Section 6 of the federal Constitution, no cause of action could be asserted against respondents for acts performed by them in their official capacities (pp. 12-14).

Amicus says that whether or not respondents may be held liable in damages for the acts in question, "there is no question about the right to injunctive relief against them if their acts are illegal," citing *Anti-Fascist Committee v. McGrath* (1951), 341 U. S. 123, 140, and *Parker v. Lester* (9th Cir., 1955), 227 F. 2d 708 (A. C. Br. 11).

Neither of the two cases cited involved legislative officials, to whom alone the special Constitutional immunity provided by Article I, Section 6, applies.

In our Brief on the merits we cited *Nelson v. United States* (D. C. Cir., 1953), 208 F. 2d 505, 513, *cert. den.* 346 U. S. 827, where the court said that "a court can no more enjoin a congressional committee from making an unconstitutional search and seizure than it can enjoin Congress from passing an unconstitutional bill."

D. A State Court Has No Duty to Afford a Civil Remedy to One Whose Federal Privilege Against Self-Incrimination Has Been Violated.

Amicus argues that, assuming that petitioners' rights under the privilege against self-incrimination of the Fifth Amendment were violated, the state court below was compelled to afford petitioners a remedy, under the supremacy clause of the Constitution.

Amicus' argument on this novel contention consists of the following:

> "Under the Supremacy clause of Article VI of the Constitution the State Court was obliged to recognize and redress the violation of petitioners' Constitutional right, since, concededly, the court's 'jurisdiction is adequate for the purpose.' *Miles v. Illinois Central R. Co.*, 315 U. S. 698, 703. See also *Smith v. O'Grady*, 312 U. S. 329, 331; *Davis v. Wechsler*, 263 U. S. 22, 24." (A. C. Br. 14.)

The three cases which *amicus* cites afford no support for its position.

The Court's remarks in the *Miles* case about the supremacy clause related to the Federal Employers' Liability Act, which not only expressly confers concurrent jurisdiction on United States and state courts, but expressly prohibits removal of an action instituted in a state court.

In *Smith v. O'Grady* the court's statement that state courts have the obligation to enforce all rights secured by the Constitution was made in connection with a petition for habeas corpus alleging that petitioner had been convicted by methods violating the Fourteenth Amendment—which of course expressly applies to states.

Davis v. Wechsler held that a state court could not entertain a suit in violation of a federal regulation designating the county or district in which suits might be brought against railroads under federal control.

As Industry Respondents have shown, whether or not such a duty might be imposed upon state courts by statute, in the absence of such a statute such courts have no duty whatever to provide a remedy for one whose federal privilege against self incrimination has been infringed. (Ind. Resp. Br. in Reply to A. C. pp. 13-16.)

E. Federal Statutes Do Not Create a Federal Question in This Case.

Amicus also maintains that, even ignoring the applicability of constitutional immunity to respondents, a federal question is nevertheless presented by the amended complaint.

Amicus refers to 18 U. S. C. 241 (A. C. Br. p. 16).

It has been held many times that this section has no application whatever to civil litigation.

Smith v. Jennings (W. D. Mich., 1957), 148 Fed. Supp. 641, 643.

Agnew v. City of Compton (9th Cir., 1957), 239 F. 2d 226, 230;

Gordon v. Garrson (E. D. Ill., 1948), 77 Fed. Supp. 477, 479.

Also, as industry respondents have pointed out, the statute applies only to citizens of the United States, and the amended complaint in this cause does not allege or reveal whether or not petitioners, or any of them, are citizens (Reply to Ind. Resp. to A. C., p. 16).

It is doubtful if the statute applies to the privilege against self-incrimination. In *United States v. Williams* (1951), 341 U. S. 70 (A. C. Br. 16) it is said: "*substantive powers* of the federal government . . . may clearly be protected from private interference" (p. 78; emphasis added). This language suggests *Powe v. United States* (5th Cir., 1940), 109 F. 2d 147, *cert. den.* 309 U. S. 679 (A. C. Br. 17) where it was held that 18 U. S. C. 241 did not apply to any right contained in the first ten amendments to the Constitution (in that case, specifically, free speech under the First Amendment);

that those amendments did not contain grants of power, but were limitations on the federal government.

Earlier cases in accord include:

United States v. Cruikshank (1876), 92 U. S. 542, 552 (A. C. Br. 16) (right of peaceable assembly not within the statute);

United States v. Crosby (C. C. So. Car., 1871), Fed. Cas. No. 14,893, at p. 704 (right to be free of unreasonable searches and seizures not within the statute).

Amicus also refers to 2 U. S. C. 192, dealing with punishment of witnesses for contempt of Congress, but no question of punishment for contempt is here involved.

If we correctly understand *amicus'* position, it does not argue that the statutes apply here directly, but that the existence of the statutes, considered together with the Constitutional privilege, creates an "area of federal policy"; and that, since petitioners' amended complaint relates to this policy area, it therefore states a federal question.

In our view this is a *non sequitur*.

It can hardly be said that a criminal statute (which has no application to civil litigation, applies only to citizens, and probably does not apply to the privilege against self-incrimination), a statute providing for the punishment of witnesses in contempt of Congress (there was none here), and the presence of several Congressmen as defendants, created a federal question in this case.

Conclusion.

The writ of certiorari should be dismissed for want of jurisdiction. If, however, it is determined that jurisdiction of the merits exists, the judgment of the District Court of Appeal should be affirmed.

Respectfully submitted,

GUY RICHARDS CRUMP,
Attorney for Respondents Doyle, Jackson, and Wheeler.

HENRY W. LOW,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

Brief of American Civil Liberties Union, Southern California Branch Amicus Curiae in Support of Petition.

A. L. WIRIN, and
HUGH R. MANES,
257 South Spring Street,
Los Angeles 12, California,
Counsel, American Civil Liberties Union, Southern California Branch, Amicus Curiae.

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STATUTE

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IN THE

Supreme Court of the United States

October Term, 1956

No. 552

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

Brief Amicus Curiae in Behalf of Petitioners by American Civil Liberties Union, Southern California Branch.

Preliminary Statement.

The American Civil Liberties Union is a national organization which defends the civil liberties of everybody, even those whose anti-democratic opinions it abhors and opposes; but which, because that is its function, bars from its governing bodies and staff all who hold such anti-democratic beliefs, whether Communist, or Fascist, as well as all adherents to all totalitarian doctrines.

The ACLU has long recognized the right and duty of a free nation to maintain its security by eliminating or excluding from positions closely affecting security persons who constitute a substantial risk of subversive action. But any such designation either of persons or positions, should be the exclusive function of the security agencies of the executive branch of government. In all other positions in a free society, employment should be decided

on the basis of qualifications strictly relevant to the particular task involved. We do not, in humane and civilized America, kill or jail or force on relief even those whom we regard as too untrustworthy to occupy positions close to the nation's security. Hence, the only remaining possibility is to let them work in other positions, according to their qualifications. This is a hard doctrine in a time of international tension, but it is not only indispensable to a free society, but made the more urgent by the struggle for men's minds through demonstrating our sincerity.

Members of the public who object to a performer for whatever reason may, within the spirit, as well as the letter of the Constitution, express their disappproval in several ways, for example, by peaceful picketing, or by publication—within the laws of libel or slander—of derogatory information. When when they suppress or censor a performer not unacceptable to others, they then violate the ideal of the First Amendment, and the notion that differences of opinion may be handled by argument, rather than suppression. Particularly is this true where—as in the case at bar—censorship and suppression is undertaken without even the most rudimentary safeguard of due process.

Here, as everywhere in a free society, there is a choice of risks. The best solution is that which promises the greatest balance of benefit over harm for the whole society. The ever increasing attempts of pressure groups to bring about the censorship or suppression of that of which they disapprove, are dangerously undermining the foundation stones of American democracy, the freedom of expression. For these reasons, the ACLU, Southern California Branch, respectfully appears as *amicus curiae* in support of the Petition for Certiorari.

I.

The Refusal of the California Courts to Grant Petitioners Relief From Respondents' Blacklist Constitutes State Action, and Therefore, Unconstitutionally Deprives Petitioners of Their Liberty and Property Without Due Process of Law and Denies Them the Equal Protection of the Law.

A.

The Right to Work Is Constitutionally Protected by the Fourteenth Amendment.

Prior to the filing of the action at bar, each petitioner had been regularly employed in the motion picture industry anywhere from 5 to 25 years;[1] but respondents, *representing the entire industry*,[1a] agreed among themselves to exclude petitioners from further employment therein solely because each had asserted his constitutional rights in declining to testify before a Congressional investigating committee.[2]

Amicus believes that the failure of the California courts to afford petitioners relief from said conspiracy was equivalent to state action, and thus poses serious constitutional questions which, it is respectfully urged, this Court should review. To these issues *Amicus* now addresses itself as follows:

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[1]See Record at Bar, pp. 66, 75, 77-78, 80-82, 84-85, 87-89, 91-92, 94-96, 98-99, 101-102, 104-105.

[1a]Except of course the respondent members of, and investigator for, The House Committee on Un-American Activities named in complaint at bar. See Record, pp. 66-71.

[2]See complaint herein [R. 65, *et seq.*]. Respondents interposed a demurrer thereto, so that properly pleaded allegations therein are deemed true. *Collins v. Hardyman*, 341 U. S. 651, 652; *Hauger v. Gates*, 42 Cal. 2d 752, 755, 269 P. 2d 609, 610.

The respondents at bar offered petitioners a choice: either surrender of their federal privileges and immunities, or else no further employment. A man must work to feed, house and clothe himself and his family.[3] An election between survival and liberty, therefore, reduces the Constitution to empty platitudes, for neither dead men nor robots need constitutions. The right to work is a human right, a personal right, a Constitutional right (*Truax v. Raich*, 239 U. S. 33, 41; *Smith v. Texas*, 233 U. S. 630, 636), and the opportunity to earn a living cannot be unjustly withheld from a man without doing violence to the Constitutional guarantees protecting his life, liberty and property, and assuring him of equal protection of the law (*Smith v. Texas, supra*, p. 641; *Truax v. Raich, supra*, p. 41; Cf. Mr. Justice Douglas, dissenting in *Barsky v. Board of Regents*, 347 U. S. 442, 472). A jobless man soon becomes a hungry man—and to palliate hunger, men have relinquished their liberty, or else have stolen it from others.

B.

A Political Blacklist Is an Unlawful Conspiracy Which Deprives Men of Their Constitutional Rights and Liberties.

This is not to deny the undoubted right of a private employer to hire and fire for whatever reason (subject to contractual or legislative restraints) he sees fit. But that is not the case here because each respondent, upon joining in the conspiracy, waived his right to exercise his

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[3]See: Mr. Justice Douglas, dissenting in *Barsky v. Board of Regents*, 347 U. S. 442, at p. 472.

own unfettered judgment, and thereafter submitted his individual prerogatives to the collective discretion of the group.

> "The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others." (*Truax v. Raich, supra*, p. 38; *Masters v. Lee*, 39 Neb. 574, 586, 58 N. W. 222, 226.)

The frank objective of such conspiracy is to deny employment opportunity in the motion picture industry,[4] to such persons as have (properly) exercised their constitutional rights before investigating committees.[5] The conspirators do not pause to see whether a petitioner herein is held in contempt of Congress or convicted of perjury, nor do they seem to doubt (as the witness reasonably might)[6] the lawfulness and propriety of the investigating committee and its questions. Rather respondents' action is akin to frontier law; they draw their own (but erroneous)[7] inferences from petitioners' assertion of the Self-Incrimination Clause, and without affording any of them an opportunity to be heard, agree to cut petitioners off from further employment in the industry. In short, respondents have used their industrial power to blackmail

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[4]See the so-called WALDORF statement which defendant motion picture employers issued in 1947. John Cogley, *Report on Blacklisting* (1956), Vol. I, pp. 22-23.

[5]Cogley, *Report on Blacklisting*, Vol. I, *supra*, pp. 95-109.

[6]*Watkins v. United States* (CCA DC), 233 F. 2d 681, 688; cert. granted, No. 261, 25 LW 3104 (10-8-56); *United States v. Kamin* (DC Mass., 1955), 135 F. Supp. 382, 389; *United States v. Lamont* (CCA 2, 1956), 236 F. 2d 312.

[7]*Slochower v. Board of Education*, 350 U. S. 551, 557; *Emspak v. United States*, 349 U. S. 190, 195.

petitioners into forfeiting their constitutionally protected rights.

Our constitutional forefathers, however, rejected the barbaric practice of *peine forte et dure*, whereby a plea was extracted from an accused who stood mute by placing great weight of iron upon his stomach.[8] The admitted actions of the defendants at bar differ only in technique.

Moreover, this is a government of laws, not of mobs. As this Court recently pointed out: "The government of a strong and free nation does not need convictions based upon [perjured] testimony. It cannot abide with them." (*Mesarosh v. United States* (No. 20, Nov. 5, 1956), ... U. S. ....., 25 LW 4001, 4004-4005). Neither does this country need "convictions" wrung from false inferences by kangaroo courts (*Williams v. United States*, 341 U. S. 97, 101). If petitioners deserve punishment for their beliefs, associations—or silence—it is for a legally constituted court, not a private group of individuals, to impose it. For when it is otherwise, then the evils depicted under Point II of this brief infest our way of life, destroy our democratic system, and trample upon those freedoms already acquired at precious cost. *Amicus* respectfully submits, therefore, that the objective and methods of the conspiracy and hence the conspiracy itself, are unlawful.

C.

The Denial of Relief by the California Courts Converts the Unlawful Conspiracy Into State Action.

The Fourteenth Amendment prohibits the State from depriving its residents of life, liberty or property without due process of law, or denying those within its borders the

[8] 4 Bl. Comm. 327-328, (2 Jones Ed., 1916, p. 2559-60).

equal protection of the laws. Accordingly, a state may not sit idly by while men lose their liberty in the competitive struggle for economic security.[9] By denying petitioners relief, the court lends the enforcement machinery of government to perpetuation of the unlawful purposes as well as the iniquities of the conspiracy. It was rather the obligation of the California courts to reopen the gates of opportunity to petitioners not to put a lock thereon, and throw away the key. (Compare: *Shelley v. Kraemer*, 334 U. S. 1.)

If the Fourteenth Amendment be given meaningful content, then the injunction against arbitrary state action must be read as a command to the state to protect its inhabitants from such unlawful conduct by others—especially when it is asked to do so.

> "The Fourteenth Amendment requires that equal protection to all must be given—not merely promised" (*Smith v. Texas*, 311 U. S. 128, 130).

Manifestly, it is no answer that petitioners failed to allege an existing contractual relationship with defendants since, under the circumstances none could exist. Nor need there be in such a case as this, for we have but to unbutton the specious rationale of that argument "to discover beneath [it] the very negation of all the ideals of the equal protection clause."[10]

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[9] *Smith v. Texas, supra*, p. 636; *Truax v. Raich, supra*, p. 39; *Takahashi v. Fish & Game Commission*, 334 U. S. 410, 420; Compare: *Steele v. Louisville & Nashville R.R. Co.*, 323 U. S. 192; *Betts v. Easley*, 161 Kansas 459, 467, 169 P. 2d 831, 843.

[10] Concurring language of Mr. Justice Murphy in *Takahashi v. Fish & Game Commission*, 334 U. S. 410, at p. 427.

For one thing, this Court,[11] as well as the California courts,[12] has upheld the discharge of public employees who assert their constitutional rights before government bodies, on the ground that public employment is a privilege. Such public employee, it is said, has the alternative of going into private industry.[13] The studies on blacklisting in the entertainment field demonstrate, therefore, that the California decision at bar, if left standing, will tend to starve petitioners.[14]

Moreover, these petitioners have devoted many years of their lives as employees of one or more of the respondents.[15] Each petitioner has been dependent upon the industry for his (or her) livelihood. On the other hand, respondents[16] own and dominate the motion picture industry, and thereby control its employment policies and practices.[17] An agreement among them to exclude petitioners from the industry becomes, then, a conspiracy "of

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[11]*Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716, 721; *Adler v. Board of Education*, 342 U. S. 485, 492.

[12]*Steinmetz v. State Board of Education* (1955), 44 C. 2d 816, 824; 285 P. 2d 617, 621; cert. denied (351 U. S. 915); *Christal v. Police Commission*, 33 Cal. App. 2d 564, 569; 92 P. 2d 416, 419-420.

[13]See: *Adler v. Board of Education*, 342 U. S. 485, 492.

[14]John Cogley, *Report on Blacklisting*, Vol. I (Movies) and Vol. II (Radio-Television), published by the Fund For The Republic, Inc.; Merle Miller, *The Judges and The Judged* (1952, Doubleday & Co., Inc.).

[15]Again, with exception of Respondents indicated by footnote 1a, *supra*.

[16]See footnote 1, *supra*.

[17]The allegations [R. 67-71] having been admitted. See footnote 2, *supra*.

such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under the laws" (*Collins v. Hardyman*, 341 U. S. 651, 662).

Such illegal and unconstitutional practices invariably tiptoe their way into the law by too close adherence to form. (*Boyd v. United States*, 116 U. S. 616, 635; *Lane v. Wilson*, 307 U. S. 268, 275; *Thomas v. Collins*, 323 U. S. 516, 543.) But it is not only that it is "the duty of the courts to be watchful for then civil liberties of a citizen (*Boyd v. United States*, *supra*, p. 635). As Judge Learned Hand once put it:

> "The question is no less than whether courts must put up with shifts and subterfuges in the place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance." (*Loubriel v. United States* (CCA 2, 1926), 9 F. 2d 807, 808.)

Petitioners have requested an injunction to restrain respondents from continuing their conspiracy. "Equity is rooted in conscience" (Justice Frankfurter, concurring in *Hurd v. Hodge*, 334 U. S. 24, 36); so that while "an injunction is . . . 'an extraordinary remedial process'" resting in sound judicial discretion, to refuse to exercise such discretion where, as here, fundamental personal rights are at stake, is not conscionable (*cf.* Mr. Justice Frankfurter opinion in *Hurd v. Hodge*, *supra*; *Truax v. Raich*, *supra*, p. 39).

II.

The Blacklist Serves as an Unconstitutional Prior Restraint on Freedom of Speech, Press, and Assembly.

In October, 1947, the House Committee on Un-American Activities held a two-week long hearing on the subject of Communism in Hollywood.[18] Since conclusion of those proceedings, there had been persistent rumors, supported by numerous articles in magazines and other publications,[19] of political blacklists in the entertainment industry. If these reports were true, then the influence of such lists upon mass-communication industries like moving pictures, radio and television would have serious and even dangerous potentialities. Consequently, several independent studies of blacklisting in the motion picture and radio-television industries were conducted to determine whether these complaints had a factual foundation, and if so, to what extent, how such lists were used, who they affected and why. Among the first of such studies was one undertaken by the journalist, Merle Miller, for the American Civil Liberties Union. His report on blacklisting in radio and television was published in 1952 in a book entitled *The Judges and The Judged*.[20] In 1956, the results of a similar inquiry into blacklisting in the motion picture and radio-television fields was published under the auspices of the Fund For The Republic as a

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[18]John Cogley, *Report on Blacklisting*, Vol. I (Movies), 1956 at p. 1.

[19]Among them: *Frontier*, May, 1954: "The Hollywood Story", p. 6; Harold W. Horowitz, "Loyalty Tests For Employment in The Motion Picture Industry", 6 Stanford L.R. 438 (and articles cited under asterisk); The Nation, "Courage In Action: I Philadelphia Theatre," September 22, 1956.

[20]Published by Doubleday & Co. (1952), and referred to hereinafter as the Miller Report.

two-volume report.[21] This study was conducted, prepared and written under the direction of John Cogley, former executive editor of the Catholic publication, *Commonweal.*

These studies reveal that irrespective of the motives for such conspiracies, political blacklists reduce the most courageous voices to whispers, evoke abject recantations from dissenters, and silence indefinitely the timid.

Moreover, the blacklist is, in truth, political blackmail—invidiously thriving on the demands of the stomach. It incorporates all the features of a trial—but a trial likened to those of the Inquisition, the Star Chamber and Salem. There is, of course, the "crime" and an "accused". Next there is the "trial" itself, which would be more accurately characterized as the "ordeal". Then, there are the "judges", the "clearance" men, who weigh the "evidence", and mete out "punishment".

This Court recently had occasion to warn of such a conspiracy as the case at bar (*Emspak v. United States*, 349 U. S. 190, 195; *Quinn v. United States*, 349 U. S. 155, 164. Indeed in *Wieman v. Updegraff*, 344 U. S. 183, 190, 191, this Court condemned the application by a state of a blacklist published by the Attorney General.

Because petitioners are victims of a blacklist, it is the purpose of this portion of the brief to review its application as reported in the aforementioned studies, demonstrating thereby, its unconstitutionality as a prior restraint upon the liberties of not just petitioners, but all of the listening, watching and reading public.

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[21] John Cogley, *"Report on Blacklisting"* (Fund for The Republic), 1956 (two volumes), referred to hereinafter as the Cogley Report. Such reference will be to Volume I of the study only, unless otherwise indicated.

A.

The "Crime."

The "crime" which assigns an individual to the blacklist has no definitive limits or standards. Indeed, one may have committed a "crime" without realizing it; so that an actor, for example, who had gone a long period without receiving a call from his studio, might conclude that he "was simply washed up."[22]

The "crimes" are as many and as varied as the accusers. Refusal to testify before an investigating committee on a claim of privilege means certain consignment to the blacklist.[23] Yet, Gale Sondergard, who had appeared in forty-five motion pictures, had earned one academy award, and had been nominated for another, found herself unemployed after her husband had declined to testify.[24]

Two of the ten Hollywood witnesses whose conviction for contempt of Congress (for having declined solely on "First Amendment grounds" to testify before the House Committee) was sustained on appeal filed a Petition for Certiorari in this Court.[25] The mere signing of an *amicus curiae* brief in support of said Petition was later deemed

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[22]Cogley Report, p. 127.

[23]*Id.*, p. 109. Roy Brewer boasted at a meeting of the Motion Picture Alliance in 1952 that "not one of the witnesses who 'hid behind the Fifth Amendment' in the previous year and a half of hearings had subsequently been offered employment in the film industry."

[24]Cogley Report, p. 80. Miss Sondergard is one of the petitioners herein. For a more recent and shocking application of the blacklist to her, see *The Nation*, "Courage In Action," September 22, 1956.

[25]*Lawson v. United States*, 339 U. S. 934 (cert. denied); *Trumbo v. United States*, 339 U. S. 934 (cert. denied).

a "crime".[26] One of such signatories was Anne Revere whose movie career, going back to 1940, has been distinguished by one academy award performance, and nomination for another. In the two years following her appearance on the *amicus* brief, she worked approximately thirty-one days.[27]

Another group of individuals who fell within the shadow of the blacklist were the more than two hundred members of an actors association which sponsored trade paper advertisements, captioned: "THE THOMAS-RANKIN COMMITTEE MUST GO!"[28]

Any person named as a Communist Party member, either past or present, became, *sua sponte*, blacklisted.[29] In fact, it was a "crime" to be mentioned at any legislative hearing as the member of any organization remotely suspected of Communist influence.[30]

But while a blacklisted individual might not know the real cause of his unemployment or experience great difficulty in discovering it, there are, nonetheless, "standard texts" which will provide him with a clue. The most useful source material, of course, are the Congressional, state and local legislative reports on Communism which have the advantages of being privileged.[31] One such report, compiled by the Dies committee in 1944 as the (in)-

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[26]Cogley Report, p. 79.

[27]*Id.*

[28]*Id.*, p. 78.

[29]*E.g. Id.*, p. 125; Miller Report, pp. 29-31, 100 *et seq.*

[30]*E.g.* Miller Report; Chapter 4; Cogley Report, p. 162.

[31]Miller Report, p. 127; see: Horowitz, "Legal Aspects of 'Political Blacklisting' In The Entertainment Industry," 29 Southern California L.R., pp. 263, 278, *et seq.* (1956).

famous "Appendix Nine", contains an index of some 22,000 names of persons an organizations allegedly associated in some way with Communism in the United States. This information was unverified, and is conceded by one of its compilers to contain the names of many who probably deserve no link with Communism or subversion. Yet, this indiscriminate catalogue is at the disposal of private individuals and groups, and remains as an "authority" relied upon by the "clearance" men.[32]

A publication known as "Red Channels" has served as the "bible" for the radio-television industry.[33] It contains 151 names[34] drawn from reports of the House and the California Committee on Un-American Activities, the Daily Worker (a Communist Party publication), and Counterattack.[35] The latter is a four page militantly anti-Communist, weekly "fact" sheet edited by the publishers of "Red Channels".[36] The information appearing in "Red Channels" was not verified, it having been thought unnecessary inasmuch as official government publications were privileged,[37] while the names printed in The Daily Worker were "presumably" checked before being printed therein.[38]

Some information is gathered a little more "informally", such as a list naming 300 persons compiled by the American Legion from "scattered public sources",

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[32]Cogley Report, p. 121, 129.

[33]Miller Report, Chapter 4, p. 98.

[34]*Id.*, pp. 30-31.

[35]*Id.*, p. 117 *et seq.*

[36]*Id.*, pp. 30, 98.

[37]*Id.*, pp. 126-127.

[38]*Id.*, p. 135.

and furnished to eight major motion picture studios with instructions to "check this material for any factual error and make such reports to us as you deem proper."[39] It is reported that upon the appearance of the list "Legion headquarters was swamped with requests for political 'clearances' from nervous Hollywood actors and writers."[40]

B.

The "Judges."

Membership in a proscribed organization, or such other political offense, did not necessarily result in life banishment from the industry. Fortunately, there were individuals and groups who recognize the fallibility of men, and who were able to "separate the liberal lambs from the Communist wolves."[41]

One of these was Roy Brewer, who until 1954, was West Coast representative of the most powerful trade union in the industry,[42] and chairman of the board of the militantly anti-Communist MPA.[43] It was he who made it possible for Edward Dmytryk to become the first ex-Communist to return to work.[44] Thereafter, other ex-Communists turned to Brewer for help, until ultimately no listee referred to him became employed without it.[45]

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[39]Cogley Report, pp. 125-126.

[40]*Id.*, p. 126.

[41]*Id.* p. 131.

[42]International Alliance of Theatrical Stage Employees (IATSE); see *id.* pp. 47-73.

[43]Motion Picture Alliance; Cogley Report, pp. 10-11, 82.

[44]*Id.*, pp. 83-84.

[45]See, for example, *Id.*, p. 146-149.

Brewer's "rehabilitation" program was a prerequisite for re-employment.[46] It required the ex-Communist (or other listee) to first make a detailed report to the F.B.I. He next contacted the House Committee[47] for the purpose of working out a public repentance. Thereafter:

> "The ex-Communist was expected to testify (which meant naming names in public session), denounce the Party at union meetings and, if he was prominent enough, make some kind of statement for the press, write an article for a magazine, or in some other way publicly express his new feelings about the Party."[48]

Another avenue of re-employment was provided through the law offices of the senior partner of a leading theatrical firm.[49] His role as a "clearance lawyer" began inauspiciously enough when four of his clients were served with subpoenas to appear before the House Committee. After several pre-hearing trips to Washington to discuss their cases with committee members, he advised his clients to testify fully. They did, and, as word began to spread that "the Committee tended to make the ordeal somewhat easier" for his clients, other subpoenaed studio employees came to the attorney for advice. He is said to have represented some fifty "subpoenees" before the House Committee, and an additional twenty-five blacklisted persons

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[46] *Id.*, pp. 85-86.

[47] On Un-American Activities.

[48] Cogley Report, p. 84.

[49] His name, though deleted here is mentioned in Cogley's Report, p. 85. It should be added that this attorney was already a wealthy man, and claims to have lost $50,000 in his service as a "clearance lawyer" (p. 88), fn. 1. On the other hand, the financial opportunities for one less scrupulous cannot escape notice.

[50] Cogley Report, p. 87.

who, though never Communists, had "front records" which necessitated satisfactory explanations to Brewer and others.[51]

The power and prestige enjoyed by the "judges" did not go unobserved by those without it. One organization, the "Wage Earners Committee" conducted an intensive picketing campaign of motion pictures whose content, producers, stars or playwright it deemed objectionable.[52] Furthermore, their publication, The "National Wage Earner" designated ninety-two current films "which employ commies and fellow travelers and certain subversive subject matter designed to defame America throughout the world."[53]

Subsequently, the executive director of the organization notified the movie studios that his group would stop picketing "if the Industry would make an honest, and resultantly effective policing of this medium. And this must include the immediate cessation of all pictures in which Americans are pictured as being intolerant and prejudiced against any so-called minority groups."[53a] Representatives of the group were good enough to offer themselves as consultants to the studios relative to the content of motion pictures and "the loyalty of artists considered for employment".[54]

Yet, because of their high degree of sensitivity to public opinion, the movie and radio-television industries prove extremely vulnerable to the slightest pressures. For ex-

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[51] *Id.*, p. 88.

[52] *Id.*, pp. 113-114.

[53] *Id.*, p. 114.

[53a] *Id.*, p. 114.

[54] *Id.*, p. 114.

ample, after her academy award performance in "Born Yesterday", Judy Holliday had become a valuable and lucrative "property" to her employers, Columbia Pictures. But in Washington, D.C., and in New York, members of the Catholic War Veterans picketed two of her films, and distributed leaflets describing her as "the darling of the Daily Worker".[55]

Columbia announced that it was satisfied that Miss Holiday was loyal, but the picketing continued. Then, the studio hired Ken Bierly, one time editor of the aforementioned anti-Communist weekly "Counterattack", to "clear up the confusion about Judy Holliday."[56] Thereafter, the picketing stopped, and "the protests against Judy Holliday and [Born Yesterday] soon died down."[57] Bierly is reported to have later explained:

> "You might put it . . . . that I had something to do with getting the facts, the true facts, to the right people."[58]

The American Legion was of even greater assistance to the motion picture studios. 1951 was a year which found Hollywood again under investigation by the House Committee.[59] Donald R. Wilson, who in October was elected National Commander of the Legion, had a few months earlier proposed that representatives of the Legion meet informally with leaders of the movie industry to confer on the problem of Communism in Hollywood.[60]

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[55] *Id.*, p. 115; Miller Report, pp. 147-148.

[56] Cogley Report, p. 115; Miller Report, p. 147.

[57] Miller Report, p. 148; Cogley Report, p. 115.

[58] Miller Report, p. 148.

[59] Cogley Report, p. 92 *et seq.*

[60] *Id.*, p. 118.

Even as he extended the offer, some Legion posts were engaged in picketing of movie theatres.[61] Industry executives, however, failed to send a message to the convention; and in December, 1951, there appeared in the American Legion Magazine an article entitled: "Did the Movies Really Clean House?"[62] Its author was J. B. Matthews (sometimes referred to as Mr. Anti-Communist), who, among other things, is reputed to have assisted in the preparation of "Appendix IX."[63]

Matthews' article, of course, answered the question posed by its title in the negative, and listed sixty-six persons active in films who were allegedly associated with the Communist movement, the studios in which they worked, and their current productions. The article also suggested that the Legion would be satisfied with a house cleaning only when certain studio employees were fired.[64]

Of those movie personalities designated by Matthews, seventeen were named exclusively for their appearance on the (aforementioned) *amicus curiae* brief in the so-called Hollywood Ten (contempt) case. Others were selected solely as signatories to the protest ads during the 1947 hearings. Still others were described as "affiliated" with, or "supporting" Communist fronts, although the nature and degree of such alleged "affiliation" or "support" was not specified.[65]

In any event, the point was not lost upon the top leaders of the movie industry, and they met with Legion representatives the following March.

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[61] *Id.*, p. 119.
[62] *Id.*
[63] *Id.*, p. 121.
[64] *Id.*, pp. 119, 123, 124.
[65] *Id.*, p. 124.

At the Conferenee, the Legionnaires explained that while they appreciated the industry's plight, the Legion would not "call off its dogs" until the industry made earnest efforts to "clear up the situation."[66]

Spyros Skouras, head of 20th Century-Fox, argued that his studio had already consulted with George Sokolsky; was in the process of collecting information relating to its employees, and was inviting the latter to prove their innocence by "written, signed explanations or denials." A Colum. Pictures executive advised the Legionnaires that his studio had undertaken a similar program "for almost a year". RKO representatives insisted that they had already compiled information "on employees who might find themselves in difficulties".[67]

A compromise was reached when the movie executives accepted the Legionnaire proposal to compare notes "in the hope of confining the Legion's criticism to personnel whose studios could find no factual defense for them".[68] Accordingly, within the next few days, an informal list of 300 names was sent to the studios with directions to "check this material for any factual errors and make such reports to us as you deem proper".[69]

Every studio employee on the Legion list was instructed to write a letter disavowing or explaining the Legion's citations. Those who refused were summarily discharged, or at least not rehired.[70]

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[66] *Id.*, pp. 124-125.

[67] *Id.*, p. 125.

[68] *Id.*

[69] *Id.*, pp. 125-126.

[70] *Id.*, pp. 126-127.

> "Others who were not employed by any studio at the time the Legion list first appeared discovered that they had become unacceptable at the casting offices. In some cases this knowledge was gained only after months of mysterious and nerve-racking unemployment."[71]

The task of adjudging the acceptability of the letters of explanation fell to George E. Sokolsky, a nationally-known newspaper columnist. It is reported that Sokolsky had at his command the complete compendium of research into the field of "Communist infiltration" compiled by his friend, J. B. Matthews; and he is alleged to have once told a radio-television sponsor that "since the 'file' at his disposal contained several million names, it is only a matter of a telephone call and a twenty-minute wait before anyone in show business can be thoroughly 'checked' ".[72]

While he denies responsibility for an individual's blacklisting, Sokolsky accepts credit for assisting in their re-employment.[73] Letters of explanation turned into studio front offices were forwarded to the Legion. Those not "patently satisfactory" were passed on to Sokolsky whose "grim duty" it then became to determine the "trustworthiness" of the writer. Those cases where there remained some doubt were referred to Brewer and Ward Bond (a movie actor).[74]

Since the several rehabilitation programs were designed to satisfy such groups as the Motion Picture Alliance (MPA), it was only natural that its more active mem-

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[71] *Id.*, p. 127.
[72] *Id.*, p. 129.
[73] *Id.* p. 130.
[74] *Id.*, p. 131.

bers be also called upon to sit in judgment. Thus, such persons as Ward Bond (an actor), Borden Chase and Martin Berkeley (writers), were called upon to determine the "employability" of their competitors.[75]

C.

Ordeal by Letter.

"Letters of explanation" by actors designated by the Legion became a condition precedent to further employment, irrespective of the triviality or remoteness of the association, or how honorable his motives. Furthermore, letter writing developed as a science in that the letter was unacceptable unless it followed a specific form, that is:

> "If an employee belonged to an organization later identified as a Communist-front group, his 'letter' had to include statements that he had not known the organization was a front, had clearly been 'duped', and as a loyal American citizen violently opposed Communism. Letters which did not include such statements were returned with the request that the signer try again."[76]

For example, one actor was charged with membership in an organization which sponsored one of the protest ads during the 1947 hearings, and with having "endorsed" the unfriendly witnesses who appeared before the House Committee. His first letter was an highly indignant denial of membership in the Communist Party, with a blunt declaration that he was available at any time to answer—to the proper authorities—"any questions regarding past associations and activities." The letter was returned as

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[75] *Id.* p. 107

[76] *Id.* p. 144.

unsatisfactory, together with a copy of the studio's report on him. The actor's second letter, more pacific in tone, adopted the proper formula, and was accepted.[77]

The technique demanded was a convincing demonstration of awareness of error and repentance. In 1952, a "prominent dramatist and scriptwriter" was accused of questionable past activities which required an explanation to Roy Brewer. The writer discussed the charges, and added a history of his anti-Communist activities and sentiments as well. The letter was returned as unsatisfactory because "it did not accomplish the purpose for which it had been written."

A second letter, seventeen single-spaced pages in length, was then forwarded to Brewer, and it too was rejected as not repentant or humble enough, and was even occasionally defensive.

The writer tried once again, this time utilizing the correct techniques. Yet, the changes and deletions failed to satisfy Brewer. The writer then filed a sixty-four page document with the F.B.I. covering his political activities and advocacies, and relating how his work had been received in the nation's press. He remained unemployed in Hollywood.

For three years there were conferences and luncheon meetings between studio officials, the screenwriter's attorney, and, sometimes the writer, all looking to a way of meeting Brewer's terms; on two occasions the film writer even met with Brewer to discuss the problem. But he was unable to give what Brewer wanted. "And [the writer] did not work in films again until 1955".[78]

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[77] *Id.* pp. 144-145.

[78] *Id.* pp. 146-149. Brewer left Hollywood early in 1955 (*cf.* p. 47).

D.

The "Punishment."

Those strong enough and courageous enough to resist the pressures exerted upon them by blacklisting must look elsewhere for their employment. Yet, the troubles of listees unable to obtain "clearance" are not over even though they are no longer in the industry. One blacklisted radio writer was about to enter into business with a Los Angeles baker. But, when the latter discovered that the writer had been an uncooperative witness before the House Committee, the deal fell through.[79] Cogley reports:

> "Most blacklisted persons interviewed were reluctant to say how they are making their living at present. Some have received phone calls from unknown persons who use various subterfuges to find out where they are working. Many believe that their telephones are tapped. Even those engaged in day labor are reluctant to say where they are employed for fear they will be dropped from their unions if it is discovered that they 'took the Fifth'."[80]

Occasionally, however, a blacklisting case contains touches of de Maupassant. Paramount studios had purchased for $75,000 an option on the hit Broadway musical "Guys and Dolls" co-written and co-owned by Abe Burrows. MPA, however, was dissatisfied with Burrow's testimony before the House Committee, and Paramount executives decided to drop their option.

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[79] *Id.* p. 171

[80] *Id.* p. 171

But Burrows managed to obtain a "clearance" from George Sokolsky and this paved the way for Samuel Goldwyn to purchase the movie rights to the show. An embarrassed MPA attacked Goldwyn in its publication, and served notice that it would publicize the whole affair. But the picture was made, released and successful.[81]

The most tragic consequence of blacklisting, however, is that which touches the family home. After Jean Muir had been signed by a television company to portray Mother Aldrich in "The Aldrich Family" it was discovered that her name appeared in "Red Channels". The studio immediately bought up her contract, and she was dismissed. The "Jean Muir affair" attracted an unusual amount of national attention—so much so that a few days later, one of her sons "ran home from school screaming. As he rushed into her arms, he asked a question which had been the chief topic of discussion at his school:

> "'Mummy,' he shouted, 'is it true you're a Communist?'"[82]

And next to the awful personal effects of blacklisting is the ominous portent of a nation robbed of its future.

In 1952, when Judy Holliday appeared before a Senate Internal Security Subcommittee, she admitted that she had been "duped" into supporting Communist front organizations. "Senator Watkins asked her: 'You watch it now; do you not?'" to which she replied, significantly, "Ho, *do* I watch it now!"[83]

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[81] *Id.*, pp. 168-169.
[82] Miller Report, pp. 30-44, at p. 44.
[83] Cogley Report, p. 116.

Conclusion.

For the foregoing reasons, *amicus* respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,

A. L. WIRIN, and
HUGH R. MANES,
Counsel, American Civil Liberties Union, Southern California Branch, Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 33

MICHAEL WILSON, et al.,
Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, DIVISION THREE

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

EDWARD J. ENNIS,
165 Broadway,
New York 6, N. Y.

NANETTE DEMBITZ,
55 East End Ave.,
New York 28, N. Y.,
Attorneys for American Civil Liberties Union, Movant.

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MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Civil Liberties Union, hereinafter called the Union, respectfully moves for leave to file a brief *amicus curiae* in this case. The attorney for the petitioners consented to the filing, but the attorney for the respondents has refused consent.

The Union is a long-established nationwide nonpartisan organization devoted to the advancement of civil liberties, and its affiliate, Civil Liberties Union of Southern California, filed a brief in support of the petition herein with consent of the parties. The Union's interest in the instant case stems primarily from its concerns that Congressional

investigating committees confine themselves to their authorized and Constitutional functions, and also that no one suffer an arbitrary and unreasonable deprivation of liberty or property because of invocation of the Fifth Amendment's privilege against self-incrimination. Though these issues are presented by the instant case and have been raised by petitioners in the State courts and in the petition for a writ of certiorari, the treatment of them heretofore and the emphasis on other issues suggests a strong likelihood that important aspects of them may not be fully treated by the parties.

The complaint in the instant case, which was dismissed by the court below for failure to state a cause of action (142 A. C. A. 191, 298 P. 2d 152), seeks both an injunction and damages. The respondents are members of the House Un-American Activities Committee and two of its employees, as well as a number of corporate and individual motion picture producers and distributors. The respondent producers and distributors, according to the complaint, substantially control motion picture production and distribution in the United States and employment opportunities in the industry. The essence of the complaint is that the Congresisonal Committee respondents and the industry respondents agreed that there should be an exclusion from further employment in the industry of any person who refused on constitutional grounds to answer questions on political affiliations and beliefs, and of anyone who failed or refused to appear before the Committee and waive constitutional rights and testify concerning political affiliations and beliefs of themselves, members of their families, and friends. The purpose of the agreement, as alleged in the complaint, was to limit employment in the motion picture industry to persons acceptable to the Committee. As part of this agreement and to effectuate it, both Committee and industry respondents, according to the complaint, published and circulated among all employers in the industry a list of those disqualified from further employment on the

grounds of their aforesaid conduct before the Committee. The petitioners allege that they are actors, writers, and other employees of long standing in the industry who have been refused and excluded from employment pursuant to this agreement and listing.

Though the validity and constitutionality of the conduct of the Committee respondents appears to be within the scope of the questions raised in the State courts and presented by the petition for certiorari, petitioners' arguments have mainly dwelt on the activity of the industry respondents who have the power to grant or withhold employment from petitioners. Less attention is paid to the role of the Committee respondents in excluding petitioners from their calling although, according to the complaint, it appears to be as great as the role of the industry respondents. Petitioners' apparent choice of emphasis is understandable in view of their ultimate objective to obtain damages for lost employment and future employment opportunities. The Union, however, with no pecuniary interest in the litigation, would develop those aspects of the case of greatest concern from the public and governmental standpoint—in particular, the effect of the Committee respondents' participation in the alleged agreement, listing, and exclusion from employment upon the petitioners' rights to relief in this action. Consideration of the Committee's activity is of particular moment because of the principles so recently enunciated by this Court in *Watkins* v. *United States*, decided June 17, 1957 (Oct. Term, 1956, No. 261). Because the instant case involves the extent of power of Congresisonal investigating committees over the status and economic well-being of the individual, it affects much more than the private litigants in this suit, and it is appropriate that an *amicus* interested from the public standpoint be allowed to participate.

In addition to the question whether the Committee respondents' alleged conduct in concert with the industry respondents deprived the petitioners of rights without due

process of law, as claimed in the petition, the Union's brief would also develop the argument that there was a lack of due process and equal protection of the laws, in that the decision below discriminatorily refused to give petitioners the benefit of California law establishing that an exclusion from one's calling is a basis for a cause of action. This refusal, assertedly for lack of a sufficiently specific allegation in the complaint that a particular exercise of a petitioner's vocation was interfered with, avoided any consideration of the scope and any violation of the Fifth Amendment's privilege against self-incrimination and this Court's interpretations and expositions of its meaning. While petitioners raise the issue that the judgment of the California court violated due process and equal protection, they have not argued this aspect of the question.

If this motion for leave to file a brief is granted, the Union also respectfully moves that it be granted a period of two weeks from the time of notice of the grant for printing and filing of its brief, which has not been completed pending determination of this motion.

Respectfully submitted,

EDWARD J. ENNIS,
165 Broadway,
New York 6, N. Y.,

NANETTE DEMBITZ,
55 East End Ave.,
New York 28, N. Y.,
Attorneys for American Civil Liberties Union.

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EDWARD J. ENNIS,
165 Broadway,
New York 6, N. Y.

NANETTE DEMBITZ,
55 East End Avenue,
New York 28, N. Y.,
Attorneys for American Civil Liberties Union.

A. L. WIRIN,
ROWLAND WATTS,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

—v.—

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

Interest of *Amicus Curiae*

The American Civil Liberties Union is filing this brief by permission of this Court, granted on October 14, 1957 in response to its motion.

The ACLU is a nonpartisan nation-wide organization devoted exclusively to the protection and advancement of the rights and liberties guaranteed to the individual by the Constitution and basic to a free society. *Amicus* is concerned with the instant case because, according to the allegations of the complaint, members of a Congressional investigating committee have assumed the function of barring individuals from the pursuit of their calling on the basis of their behavior before or in relation to the Com-

mittee. In particular, according to the complaint before the Court, the Committee members thus implemented the Committee's disapproval of a witness who invoked the Fifth Amendment's privilege against self-incrimination in the Committee hearings. The ACLU is also concerned with the issue in the instant case of whether a State court can refuse to recognize that any legal injury arises, if those who control employment in a calling, in combination with members of Congress, bar individuals from pursuing that calling because of their invocation of Federal Constitution rights and their conduct before a committee of the United States Congress.

Statement

Proceedings—The briefs of the parties describe the proceedings below, which terminated in the affirmance of the dismissal of the complaint by the highest court of California to hear the case, the District Court of Appeal (R. 77-78), and the refusal of the California Supreme Court to review this ruling (R. 78-79).

Allegations of the Complaint—The petitioners, according to the complaint, had worked in the motion picture industry as writers, actors, and other professional employees for periods of from five to 25 years and all had reputations for high professional competence (R. 29, 38, 12, 14). The respondents are members of the Un-American Activities Committee of the House of Representatives[1] and a committee investigator, herein termed Committee respondents, as well as the major corporate and individual motion picture producers and distributors of the United States, who control, directly and indirectly, all motion picture production and distribution in the United States and employment opportunities therein, herein termed industry respondents (R. 29-34, pars. II and III).

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[1] Only two members of the Committee actually appeared as respondents (R. 60-62).

The complaint alleges, and it was and must be assumed for the purposes of this motion to dismiss,[1] that the respondents agreed and arranged to bar from employment, in the motion picture industry anyone who did not meet the Committee's standards of politically acceptable employees (R. 35, par. V, R. 37, par. VII). In particular, anyone who, relying on his Constitutional rights including the privilege against self-incrimination of the Fifth Amendment, refused to answer questions before that Committee, was to be denied employment, as well as anyone named by any witness before the Committee as a Communist who did not thereupon appear before it as a witness (R. 35, par. V). To effectuate this bar to employment, the respondents, according to the complaint, have published and are publishing a list of writers, actresses, and others working in the indusfry who so refused to testify or so failed to appear before the Committee; they have circulated, and are circulating this list throughout the motion picture production, distribution, and exhibition fields; they have induced and persuaded employers in the motion picture industry other than respondents to refuse employment to anyone on this list; and the industry respondents have themselves refused to employ anyone listed (R. 35-36, par. V).

Eighteen of the petitioners allegedly have been excluded from employment in the motion picture industry as a result of respondents' agreement and activity, because they had, relying on their Constitutional rights, and in particular the privilege against self-incrimination, refused to answer questions before the Committee, and five because they had failed to appear after being named as Communists.[2] Petitioners pray for both injunctive relief and damages (R. 40-41).

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[1] See *Collins* v. *Hardyman*, 341 U. S. 651, 652.

[2] R. 36, 38, 39; as to reliance on the privilege against self-incrimination, R. 67, and Hearings, excerpted in Appendix to Respondents' Brief in District Court of Appeal, on file with the Clerk of this Court.

State Court's Ruling and Failure to Pass on Federal Question—The State court ruled that the complaint failed to state a cause of action against any of the respondents, on the ground petitioners did not allege there were any specific contract or business relations which would have been consummated but for respondents' alleged agreement and activity pursuant thereto, but had alleged only a general expectation of employment (See R. 74, 76, 77). The Court reached this result largely on the basis of a prior State decision holding insufficient a complaint respecting a refusal to rent certain office space to a real estate broker (R. 70-71).

In resting on this ground to dismiss petitioners' complaint, the State court ignored the violations of Federal rights which the complaint established and which petitioners had raised. Our argument will show that the deprivation of Federal right in no way depended on the existence of a specific contractual or business relation; and the State court's holding on this point therefore cannot defeat the assertion of Federal rights. *Davis* v. *Wechsler*, 263 U. S. 22, 24. This Court will, of course, pass on whether the complaint states a cause of action for violation of Federal right, although the State court failed to do so. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.

Questions to Be Argued by *Amicus*

Our brief will concentrate on two arguments:

(1) The allegations of the complaint show a transgression of the Fifth Amendment's guarantee of the privilege against self-incrimination. Under the Supremacy clause, the State court must recognize and redress this invasion of petitioners' Constitutional right and for this purpose must reinstate the complaint against all respondents.

(2) Because the alleged exclusion of petitioners from their calling involves and affects the protection of the Fifth

Amendment privilege, the operations of a Congressional committee, and Federal statutes and policies, the question of whether such exclusion establishes a legally cognizable injury is a Federal question, ultimately to be determined by this Court. Under the applicable precedents, deprivation of the right to pursue one's calling must be deemed sufficient basis for a cause of action.

Questions Properly Presented to this Court—The questions we will argue were presented below and in the petition for certiorari.

Petitioners have at all times stressed the infringement of their privilege against self-incrimination guaranteed by the Fifth Amendment. The trial court discussed fairly fully whether or not, as a State court, it was obliged to accord a remedy for an infringement of the Fifth Amendment privilege (R. 46-48). The petitioners' brief on appeal, which concededly was the appropriate medium for raising questions in the State courts, argued that the Fifth Amendment privilege, as part of the Supreme law of the land, must be protected by the State courts (Opening Brief for Plaintiffs in District Court of Appeal, on file with the Clerk of this Court, pp. 25-32). That Court, though failing to accept petitioners' contention, realized that the privilege was involved (R. 67). Again, in the petition for certiorari, petitioners raised the question of Federal supremacy and the consequent obligation of the State courts to give a remedy for the infringement of the Fifth Amendment privilege (Pet. for cert., pp. 3, 27, 31).

In the Court below petitioners also stressed Federal policy and precedents with respect to interference with a Federal privilege and with respect to the right to pursue a calling (Op. Br. Dist. Ct. App., pp. 28, 18-21). In their petition for certiorari petitioners raised the same questions, and explicitly presented the issue of the State court's obligation under the Supremacy clause to follow Federal law (Pet., pp. 3, 14-15, 24-27, 30-31).

At the very least, therefore, the points we will argue are within "the fair intendment" of the questions raised below and are presented in the petition. See *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67. It is not of course essential that arguments be presented there in the precise formulation presented here. See *Braniff Airways* v. *Nebraska State Board*, 347 U. S. 590, 598-599.

We shall not attempt fully to argue the question of whether the State court denied due process and equal protection by its refusal of a remedy, though this question too is properly before this Court, because it seems amply treated by petitioners. However, we shall comment on a few aspects of this question.

Summary of Argument

I.

Assuming the truth of the allegations of the complaint, the Committee respondents' activity with respect to barring petitioners from their calling impairs the Fifth Amendment's guarantee of the privilege against self-incrimination. The threat that anyone who invokes the privilege before the Committee will be excluded from his calling in the motion picture industry, is a grave coercion against exercise of the privilege, particularly considering that invocation of the privilege is made an absolute barrier to employment regardless of any circumstances or justifying factors. The petitioners need not show any specific employment prospect to establish the violation of the Fifth Amendment guarantee, for the right to pursue one's calling is a vital one, whether or not there is any such prospect.

From another standpoint, too, there is an impairment of the Fifth Amendment guarantee. The Committee has no authority to regulate employment in the motion pic-

ture industry or take redress against witnesses. The Congressionally authorized method of controlling or punishing witnesses before a Congressional committee is prescribed by the contempt statute (2 U. S. C. 192). By imposing an additional sanction on a witness who refuses to answer on grounds of self-incrimination—exclusion from his calling in the motion picture industry—Committee respondents are imposing an unauthorized and thus illegal condition on exercise of the Constitutional privilege.

The guarantee of the Fifth Amendment is fully applicable in determining the validity of the Committee respondents' acts. In participating in the agreement and activity as alleged in the complaint, the Committee respondents were necessarily acting by virtue of their positions as Government officials, for they had no connection with or power in the motion picture industry save by virtue of their position as members of the Congressional committee investigating it.

Under Federal law, which determines the propriety of a remedy not only against Committee respondents but against industry respondents as well, there is a right to a remedy against all respondents (if the allegations of the complaint are established), because of the pervasive effect of the violation of Constitutional right by Committee respondents.

II.

Even ignoring the applicability of Constitutional limitations to Committee respondents as Federal Government officials, the question of whether the complaint alleges a legally cognizable injury is a Federal one. The alleged agreement and activity affect the exercise of a Federal privilege guaranteed by the Constitution. Protection of this privilege is a function of the Federal Government; furthermore, Congress has explicitly condemned an agreement to inflict a deprivation on an individual because he has exercised a Federal privilege. The alleged agreement and activity of respondents lie in an area of Federal policy not only for these reasons but also because they

involve the operations of a Congressional committee; relate to the punishment of committee witnesses, a matter controlled by Federal legislation; and embrace the participation of Federal officials. Under the applicable Federal precedents, the deprivation petitioners suffered of the right to pursue their calling, through the concerted action of those controlling employment in that calling, is a legally cognizable injury, regardless of whether they had any specific employment prospects.

ARGUMENT

I. The allegations of the complaint state a cause of action for violation of Federal rights. The judgment of the Court below must therefore be reversed.

A. The Committee Respondents Have, According to the Allegations, Violated the Fifth Amendment's Guarantee of the Privilege Against Self-Incrimination. All Respondents Are Involved in the Violation of Petitioners' Constitutional Right and the Complaint thus States a Cause of Action Against All Respondents.

(1) *Interference With Exercise of the Privilege Against Self-Incrimination*

The agreement and arrangement of respondents alleged in the complaint is: if anyone working in the motion picture industry exercises before the House Un-American Activities Committee the privilege against self-incrimination guaranteed by the Fifth Amendment, he will be excluded from his calling and deprived of the possibility of following his chosen and usual means of earning a livelihood. Certainly this threat constitutes a powerful coercion against the free exercise of the Constitutional privilege. Compare *American Communications Association* v. *Douds*, 339 U. S. 382, 409; *Frost* v. *Railroad Commission*, 271 U. S. 583. And this threat of hardship must be deemed to im-

pair the Fifth Amendment guarantee whether or not it succeeds in preventing exercise of the privilege. It would "emasculate" the privilege "to deny protection against reprisals to those whom threats did not deter". See *Bomar* v. *Keyes*, 162 F. 2d 136, 139 (C. A. 2, 1947, opinion by Judge Learned Hand). "Protection of the privilege • • • must encompass security against assault for having exercised it." *Robeson* v. *Fanelli*, 94 F. Supp. 62, 69 (S. D. N. Y., 1950).

The coercion against exercise of the privilege is particularly severe, with impairment of the Constitutional guarantee in consequence, because invocation of the privilege is treated as an absolute and unescapable bar to employment in the motion picture industry. According to the allegations of the complaint, no consideration is given to such factors as "the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege". See *Slochower* v. *Board of Education*, 350 U. S 551, 558-559.

It can hardly be argued that free exercise of the privilege was unaffected because, as the State court assumed, respondents deprived petitioners only of a general expectancy of employment rather than a specific prospect; this Court has never doubted that equal opportunity to seek employment in one's calling has utmost significance to an individual. See *Takahaski* v. *Fish Commission*, 334 U. S. 410, 415-416; *Truax* v. *Raich*, 239 U. S. 33, 38, 41; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 185 (Jackson, J., concurring. And see *Bomar* v. *Keyes, supra*.[1]

[1] It may be noted that petitioners' opportunities to follow their calling and to earn a livelihood depended on their status in the motion picture industry, rather than with any one company, since professional employment in that industry is free-lance; i.e., writers and actors are generally employed from company to company for the duration of particular films. (See Respondent's Brief in Dist. Ct. App., on file with the Clerk of this Court, p. 13, n. 11).

Thus, by participating in the absolute exclusion of petitioners from their calling because of their exercise of the Fifth Amendment privilege, the Committee respondents transgressed the Constitutional guarantee of the privilege, and failed in the Constitutional duty enjoined upon them by this Court, to be "most scrupulous in protecting its exercise." *Quinn* v. *United States*, 349 U. S. 155, 164.

The unjustifiable and arbitrary nature of the interference with the free exercise of the privilege is underscored by the fact that the Committee, according to the allegations of the complaint, was operating outside its authority. The Committee is not authorized to erect barriers to employment opportunities, either as a means of regulating the movie industry or controlling its witnesses; it is not to undertake "to 'punish' those investigated" in any way. *Watkins* v. *United States*, 354 U. S. 178, 187. The only authorized punishment for witnesses is that prescribed by the contempt statute (2 U. S. C. 192), under which, moreover, the witness can test the validity of the investigation in the courts. The method of control or punishment described in the complaint was extra-legal; the Committee respondents were operating outside the system of law established by Congress, as well as contrary to the Constitution. The Committee respondents were, therefore, imposing an unauthorized and thus illegal condition upon the exercise of the Constitutional privilege against self-incrimination. Compare *Frost* v. *Railroad Commission*, *supra*; *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 571; *Hannegan* v. *Esquire*, 327 U. S. 146, 156.

(2) *Applicability of Constitutional and Statutory Limitations to Committee Respondents.*

Drawing the only possible logical inference from the complaint, it is apparent that the Committee respondents were acting as Government officials and by virtue of their position as Congressional representatives in entering into

and effectuating the alleged agreement with the other respondents. While the complaint alleges that they acted "both in their official capacity" and unofficially as private individuals (R. 35),[1] they had no connection with the movie industry except through their power as representatives of the Committee investigating that industry, and their ability and resources to enter into and effectuate the agreement rested thereon. Thus, their acts, as alleged in the complaint, were subject to the Constitutional limitations on the powers of Government. Compare *Railroad Trainmen* v. *Howard*, 343 U. S. 768, 774. To preserve a Government based on law, the Constitution must apply to officials "whether they hew to the line of their authority or overstep it." *Screws* v. *United States*, 325 U. S. 95, 111. See also *Williams* v. *United States*, 341 U. S. 97, 99. As we have already shown, the restrictions implicit in the Fifth Amendment's guarantee of the privilege against self-incrimination were here transgressed.

A further possible argument against our contention that the Committee respondents interfered with petitioners' Federal rights might be that they could not themselves give or withhold employment from the petitioners. We submit, however, that the degree to which the Committee respondents could, and according to the complaint did, participate in the agreement and its effectuation, was ample to constitute a highly effective and injurious interference with petitioners' rights. The complaint alleges the Committee respondents participated and are participating in the compilation, publication, and circulation of the black-

[1] The State court adverted to, but did not pass on, the question of whether these respondents could be sued for the same acts in both capacities (R. 77). Whatever may be the correct conclusion ultimately as to the liability of these respondents in damages for their alleged acts (see cases cited by State Court, R. 77), there is no question about the right to injunctive relief against them if their acts are illegal. See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 140; *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9, 1955).

list; in this activity they might well be proved not only participants but the major force. Publicization of this list is an important measure of coercion and interference, especially in the context of the agreement not to employ anyone listed. Compare *Rumely* v. *United States*, 345 U. S. 41, 45, 47 affirming 197 F. 2d 166 (see especially p. 174); *Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 139, 159, 175, 185, 187; *Watkins* v. *United States*, 354 U. S. at p. 197.

Further, the Committee respondents allegedly participated in inducing the industry respondents as well as the other, minor, employers in the motion picture industry to refuse employment to anyone listed (R. 35-36). The Court can judicially notice that the Committee had, over a period of years, emphasized that those who refused to conform to the Committee's standards of anti-Communism should not be employed by a motion picture company, and that the Committee would expose for public scrutiny and condemnation the employment of any such suspect persons.[1] An employer's public harassment and embarrassment through exposure by the Committee, and his consequent possible economic loss, was a serious threat (see cases cited this page supra)—of sufficient gravity so that the Committee respondents had ample means at hand to induce an employer to agree to enforce the blacklist.

Finally, with respect to the role of the Committee, the complaint alleges that the purpose of the agreement was "to limit employment in the motion picture industry to those persons whose beliefs are acceptable to the said Committee" (R. 37). Considering even apart from this allegation, that the condemnatory attitude towards witnesses

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[1] See, Carr, *The House Committee on Un-American Activities* (1952) 56-58, 452; *Josephson* v. *United States*, 165 F. 2d 82, 100 (C. A. D. C., 1947), cert. den. 333 U. S. 338; *Watkins* v. *United States*, 354 U. S. at p. 199, note 32.

who refused to answer on constitutional grounds or who failed to appear after being named, could not have taken hold unless it had been favored by the Committee, the Committee respondents might well be shown to have played the dominating role in effecting the petitioners' exclusion from employment, with the industry respondents in a sense agents to carry out Committee policies. There is some indication of this possibility in the testimony before the Committee in 1947 by the spokesman for the motion picture industry, that the producers had rejected a suggested blacklisting proposal, in part because it was thought it might be illegal. (See Hearings excerpted in Appendix to Petitioners' Brief in this Court, pp. 42-46.)

We do not in any way dispute the importance of the industry respondents in enforcing the exclusion of petitioners from their calling; however, there is no question that "the Constitution operates" on Government officials even if in some respects private cooperation is necessary to complete the circuit—to transmit to the individual the injurious impact of their acts. *Railway Employees' Dept.* v. *Hansom*, 351 U. S. 225, 232. "That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction." *Watkins* v. *United States*, 354 U. S. at p. 198.[1]

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[1] See also *Anti-Fascist Committee* v. *McGrath*: "We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them" (341 U. S. at p. 141); *Rumely, loc. cit. supra* p. 12, where exposure by a Congressional Committee was deemed to raise a Constitutional question, though the Committee's act affected the individual only because of the reaction of third parties; see also *Truax* v. *Raich*, 239 U. S. 33; *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 462.

(3) *Right to a Remedy in the State Court, Pursuant to Supremacy Clause.*

Against Committee Respondents—Considering that the Committee respondents were acting by virtue of their positions as officials of the Federal government, with the legality or illegality of their acts determined by the Constitution and laws of the United States, the right to a remedy against them is also a matter of Federal law. *Deitrick* v. *Greaney*, 309 U. S. 190, 200; *Metropolitan Bank* v. *United States*, 323 U. S. 454, 456; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366. There is no doubt under Federal law of the right to a remedy for unconstitutional acts by these officials. See *Joint Anti-Fascist Committee*, 341 U. S. at p. 140.[1] Under the Supremacy clause of Article VI of the Constitution the State court was obliged to recognize and redress the violation of petitioners' Constitutional right, since, concededly, the court's "jurisdiction is adequate for the purpose." *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 703. See also *Smith* v. *O'Grady*, 312 U. S. 329, 331; *Davis* v. *Wechsler*, 263 U. S. 22, 24.

Against Industry Respondents—With the violation of Federal right established, this Court will consider and direct the effective and appropriate remedy. See *Bell* v. *Hood*, 327 U. S. 678, 684; *Board of Com'rs* v. *United States*, 308 U. S. 343, 349; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176; *Scott Paper Co.* v. *Marcalus Co.*, 326 U. S. 249, 255.

Here regardless of any other bases for a remedy against the industry respondents, we submit that the Committee respondents' unconstitutional conduct alone would require

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[1] That Congressmen are liable like other Government officials, with immunity only "for what they do or say in legislative proceedings" or in a committee inquiry that "may fairly be deemed within its province", see *Tenney* v. *Brandhove*, 341 U. S. 367, 372, 378. And see *United States* v. *Bramblett*, 348 U. S. 503.

a remedy against all respondents. The agreement, the listing of petitioners, and their exclusion from employment are, under the allegations of the complaint, permeated with the violation of Constitutional right; and if the allegations are established, the violation cannot be redressed except by a judgment against all the respondents engaged in effectuating it.[1] Furthermore, there is even a possibility that the industry respondents too were in a sense acting under color of Government authority (see discussion of industry's position in 1947 hearings, p. 13 *supra*), and thus were in a somewhat similar position to the Committee respondents in relation to petitioners' Constitutional rights. Thus, it was improper for the State court to order the dismissal of the complaint against any of the respondents.

In sum, the dismissal of this complaint would frustrate Federal Constitutional and statutory provisions, and this Court's earnest pronouncements that Congressional investigating committees must hew to their authority and respect the Constitution. To effectuate these principles, the complaint must be held to state a cause of action.

B. As a Matter of Federal Law, the Allegations as to Petitioners' Exclusion from Their Calling Establish a Legally Cognizable Injury

(1) *Federal Law Determinative of the Question of Injury*

Even ignoring the applicability of Constitutional limitations to the Committee respondents as Government representatives (discussed in Point A), the right to a remedy against respondents is a Federal question, to be ultimately decided by this Court.

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[1] Compare *Barrows* v. *Jackson*, 346 U. S. 249, 258-260; and *Picking* v. *Pennsylvania R. R. Co.*, 151 F. 2d 240, 250 (C. A. 3, 1945); *Valle* v. *Stengel*, 176 F. 2d 697, 704 (C. A. 3, 1949); *Robeson* v. *Fanelli*, 94 F. Supp. 62, 70 (S. D. N. Y., 1950); *Chadwick* v. *United States*, 141 Fed. 225, 237 (C. A. 6, 1905); *Brown* v. *United States*, 204 F. 2d 247, 250 (C. A. 6, 1953).

Under the Fifth Amendment the free exercise of the privilege against self-incrimination is guaranteed in the operations of the Federal government, and it is the function of the Federal government to protect the exercise of this privilege. See *Quinn* v. *United States*, 349 U. S. 155, 164; compare *United States* v. *Cruikshank*, 92 U. S. 542, 552.

Furthermore, Congress has carried out this Federal duty by the statute providing it is a criminal offense for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or *because of his having so exercised the same.*" (18 U. S. C. 241). Clearly, the free exercise of the privilege against self-incrimination secured by the Fifth Amendment to an individual in proceedings of the Federal government, is within the intended protection of this statute. It is one of the "rights which arise from the relationship of the individual and the Federal Government" rather than one of "those rights which the Constitution merely guarantees from interference by a State." *United States* v. *Williams*, 341 U. S. 70, 77. See *United States* v. *Cruikshank*, *loc. cit. supra.* The Federal statute condemns the very activity here in issue: a group inflicting a deprivation on a citizen because he has exercised a Federal privilege.

Thus it is clear that respondents, in excluding petitioners from their calling because of their exercise of the Federal privilege, were in an area of Federal policy, established by Constitution and statute. Their alleged blacklisting agreement and activity further affects an area of Federal control and Federal concern in that it is directed at the conduct of witnesses before, and the operations of, a Congressional committee—an agency of the Federal government controlled by Congress. Congressional statute and resolution not only determine the powers and authority of the Committee, around which the whole agreement centers, but Congress has prescribed on the specific matter of

when and how witnesses are to be punished (2 U. S. C. 192). The contempt statute limits the punishment of witnesses on the basis of the pertinency of the question, and authority of the Committee: The blacklisting here in issue imposes a sanction on witnesses, without regard to the limitations prescribed by Congress. Further, the question of whether a legal injury has been inflicted on petitioners by the alleged blacklisting agreement and activity is an issue of Federal concern because Federal officials acting by virtue of their official positions are importantly involved therein.

In sum, though "the issue is uncontrolled by any formal expression of the will of Congress", the question of the implications of the Constitutional and statutory provisions, and of how the policy expressed therein is to be vindicated, is a question of Federal law. *Board of Com'rs* v. *United States*, 308 U. S. 343, 349. See *Deitrick* v. *Greaney*, 309 U. S. 190, 200; see also *Testa* v. *Katt*, 330 U. S. 386, 389-393; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176. Here where, according to the allegations of the complaint, the thrust and policy of Federal legislation has been frustrated—particularly the policy "to maintain a Federal right in its integrity"[1]—and Federal functions have been seriously affected, it is a Federal question whether a legally cognizable injury has resulted.

(2) *Injury Established by Exclusion from Calling*

The condition imposed by the California court in this case: that no injury will be recognized unless there is a specific contract of employment in prospect—sets at naught the value of the right to pursue one's calling. It means a cause of action based on the deprivation of this right would be practically impossible, for one who has been

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[1] *Powe* v. *United States*, 109 F. 2d 147, 151 (C. A. 6, 1940), cert. den. 309 U. S. 679.

excluded from consideration for employment could hardly allege a specific employment prospect. As we suggest below, this ruling was not consistent with California law (Point II). In any event, it cannot be adopted by this Court.

Considering the vital importance this Court has attached to the opportunity to pursue the calling of one's choice—deeming it part of the fundamental liberty guaranteed by due process (see cases, cited *supra*, p. 9),—it can hardly be questioned that the deprivation of this opportunity inflicts a legally cognizable injury. Furthermore, cognizance of this injury is impelled by "those flexible considerations of equity which are established sources for judicial law-making" *Board of Com'rs* v. *United States*, 308 U. S. 343, 350. Standing in contrast to the rigid view of the California court in the instant case, are the opinions in *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 139-141, 143, 157-161, 175, 185; there there were flexible and realistic concepts as to when a legal injury is suffered, as well as recognition that an injury arises from interference with the general opportunity to seek funds or employment, despite the absence of any specific contractual prospects. In the same tenor, see *International News Service* v. *Associated Press*, 248 U. S. 215, 235-236. As to the injury arising from an interference with a mere expectancy of employment, see also *Bomar* v. *Keyes*, 162 F. 2d 136, 139 (C. A. 2, 1947, opinion by Judge Learned Hand).

Under the common law prevailing in the United States, a "concerted refusal" to enter into or continue business relations is a *prima facie* wrong, warranting a remedy unless justification is shown. While an individual refusal is not a legal wrong, a concerted refusal is so grave in its effect that it is deemed to inflict a legally cognizable injury

though there is no specific contract or relation in prospect.[1] A legal wrong also arises from an "unjustified interference with reasonable expectancies of commercial relations."[2] How much more serious was the activity alleged in the complaint, where the respondents' concerted refusal, plus their inducement of other employers, foreclosed petitioners from business relations of the type they sought, with *all* those with whom such relations were a possibility. We submit that here there can be no doubt a legally cognizable injury has been inflicted.[3]

Finally, on the question of justification for this injury, while it may not be possible to pass on this issue definitively at the present stage of the proceeding, it is to be observed that the various "public interest" considerations the respondents have suggested cannot afford them a justification when a diametrically opposite view of public policy in relation to the assertion of the Fifth Amendment privilege has been stated by this Court (*Slochower* and *Quinn, supra,* pp. 9, 16).[4] As to respondents' alleged economic justifica-

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[1] See American Law Institute, Restatement of Law of Torts (1939), sec. 765, and see illustrations, p. 47. The introduction to the volume states that it is declaratory of the "general common law of the United States" (p. x); the 1949 Supplement (p. ix) points out that there had been no departures since the 1939 draft, necessitating any change in sections 765 or 766.

See Note, Liability for Blacklisting Under the Prima Facie Tort Doctrine, 51 Columbia Law Rev. (1951) 398; Hale, Prima Facie Torts, Combination, and Non-feasance, 46 Columbia Law Rev. (1946) 196, 197; Note, Refusal to Deal as a Tort, 45 Illinois Law Rev. (1951) 784; *Aikens* v. *Wisconsin*, 195 U. S. 194, 204-206; Holmes, Privilege, Malice and Intent, 8 Harv. Law Rev. (1894) 1, 3.

[2] Restatement of Torts (1939), p. 52, commenting on sec. 766.

[3] The possibility "that damages from the nature of the tort, could only be figured approximately has no legal significance", *Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555.

[4] Compare Restatement (1939), p. 45, commenting on sec. 765: even if "the interest sought to be advanced is laudable, the concerted refusal to deal is not justified if it goes far beyond the promotion of that interest and is unduly oppressive or is otherwise prejudicial to a paramount social interest."

tion, it seems dubious that respondents will be able to show that each individual respondent's revenues would suffer unless the whole industry refused to employ petitioners. Nothing short of this would even tend to furnish an economic justification for respondents' concerted refusal and inducement of all other employers to refuse, to permit petitioners to pursue their callings. See Brief for Petitioners in this Court, pages 110-111.

II. The State Court's dismissal of the complaint denied petitioners the due process and equal protection guaranteed by the Fourteenth Amendment.

The basis of the State Court's dismissal of the complaint—that there was no right of action for an exclusion of petitioners from their calling unless a specific contractual relation was in prospect—was not a tenable basis under State law. In fact, California has recognized the right to pursue a calling as a right entitled to legal protection, and a combination to exclude an individual from his calling as a *prima facie* wrong. It has further recognized that in such a situation no specific contractual prospect need be shown or alleged since the refusal to deal makes such a prospect impossible. See *California Auto Ct. Assoc. Inc.* v. *Cohn, et al.*, 98 Cal. 2d 145, 219 P. 2d 511; *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 731, 155 P. 2d 329; *Bautista* v. *Jones*, 25 Cal. 2d 746, 749, 751, 155 P. 2d 343. The California court's refusal to apply this established doctrine to petitioners seems a denial of equal protection and due process. Compare *Griffin* v. *Illinois*, 351 U. S. 12, 18, and cases there cited; *Truax* v. *Corrigan*, 257 U. S. 312. The Court's departure from the law here seems particularly deplorable because the tenor of the opinion (R. 67-69) raises the thought that the Court's disapproval of petitioners' assumed ideology may have been a stimulus in this direction.

Further, it should be noted that by disposing of the complaint on the ground of no injury, the California court avoided the question of whether the respondents had justification for excluding petitioners from their calling. This issue involves questions of Federal Constitutional and statutory policy to which, under the Supremacy clause, the State court was obliged to give due regard. Here the Court was not loath to consider Federal policy in one regard (R. 67-69), but failed to do so where it was in fact more pertinent.

Not only do the decisions of the highest court of California show that petitioners have suffered a legally cognizable injury, but it is inconceivable that the law of California, as generally applied, could be as the Court here stated it. It is against reason that a State would deny all recourse to the courts, for either legal or equitable relief, to individuals who have worked in a calling and who can establish that a group which monopolizes or controls all employment opportunities therein has agreed and undertaken to bar them from employment. If in fact this were the law of a state—if in fact California permits a deprivation and a injury of such a vital nature without affording any possibility of a remedy—the State would deny due process. See *Truax* v. *Corrigan*, 257 U. S. 312; *Ward* v. *Love County*, 253 U. S. 17, 24; *Public Utilities Comm.* v. *Pollak*, 343 U. S. 451, 462.[1]

[1] In the *Pollak* case, this Court held the due process guarantee applicable to the act of an utility company because a Government agency had *permitted* the company so to act.

CONCLUSION

It is respectfully submitted that this Court should hold that the complaint states a cause of action against all respondents, and that the judgment of the Court below dismissing the complaint should be reversed.

Respectfully submitted,

EDWARD J. ENNIS,
165 Broadway,
New York 5, N. Y.

NANETTE DEMBITZ,
55 East End Avenue,
New York 28, N. Y.,
Attorneys for Petitioners.

A. L. WIRIN,
ROWLAND WATTS,
Of Counsel.